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BILL CHAMBER PRACTICE

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BY

JAMES ANDERSON MACLAREN

ADVOCATE

Author of "Expenses in the Supreme and Sheriff Courts of Scotland"

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PREFACE.

THE object of this work is to present within the compass of a moderately-sized volume a comprehensive survey of the many matters dealt with in the Bill Chamber, both while the Court of Session is sitting and while that tribunal is in vacation, and to furnish the practitioner in the Bill Chamber with a practical guide to enable him to prepare papers and justify his procedure by the citation of authority.

First, suspension is dealt with both as an original proceeding in the various aspects of simple suspension, suspension and interdict, and suspension and liberation, and also as a method of review. Petitions which are brought within the jurisdiction of the Bill Chamber by the Clerks of Session (Scotland) Regulation Act, 1889, are next considered, and then sequestration petitions and appeals, lands clauses petitions, railway and canal valuation appeals, and miscellaneous applications to the Lord Ordinary on the Bills. Chapters are devoted to the various applications which may be disposed of by the Clerk of the Bills himself, and to the enumeration of the various matters which may be competently dealt with in the Bill Chamber in vacation. Finally, attention is directed to the emergency legislation passed in consequence of the war.

The author has gratefully to acknowledge the assistance which he has received in the preparation of the work from the officials of the Bill Chamber. In particular, his best thanks are due to Mr. T. Swinton Paterson, S.S.C., Clerk of the Bills, who cleared up many obscure points and was instrumental in obtaining the papers necessary for the report of the case set forth in the Appendix; to Mr. David D. M'Laren (now promoted to be an Assistant Depute Clerk of Session), who has enriched the work by references to useful papers and unreported precedents; and to Mr. David A. Duncan, Assistant Clerk of the Bills, who read the work in manuscript and made many valuable alterations and additions.

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CHAPTER I.

INTRODUCTORY.

THE Bill Chamber is the tribunal where certain causes appropriate to the Court of Session during session may be initiated or advanced during the vacation of that Court, and where certain summary or preliminary applications arising either during the sitting of the Court of Session, or during its vacation, must be presented.

At the institution of the College of Justice on 17th May, 1532, Acts of Sederunt to regulate its proceedings were passed by the Court and approved of and ratified by King James V. No provision, however, was made in such Acts for the administration of justice during vacation, and accordingly on the last day of the first session of the Court of Session—31st July, 1532—the Court, presumably in the exercise of its *nobile officium*, passed an Act of Sederunt providing that such Lords of Session as were in Edinburgh during vacation should have delegated to them the powers of the Court with regard to matters that required "hasty acceleration and expedition." In 1555[1] this provision was amended, and it was enacted that in time of vacation those Judges who happened to be present in Edinburgh, whatever their number might be, could deliver the bills concerning all matters. From this it was an easy step to vacation business being undertaken by a single Judge, but there is no record of the date when this first took place.

Similarly there is no record of the date when a single Judge in time of session was first deputed to attend to Bill Chamber matters. The Act of Sederunt, 16th January, 1650, however, makes a reference to "the ordinar Lord upon the "billis." From that date forward there seems to have been a Lord Ordinary on the Bills who possessed varying powers, but no particular Judge seems to have been selected for that office

[1] Acts of Sederunt collected by Thomas Thomson, 1811, p. 57.

until the year 1813 when it was enacted that the Junior Judge, for the time being, of the three Junior Ordinary Judges of the First Division of the Court should officiate exclusively in time of session as Lord Ordinary on the Bills and perform the whole business of the Bill Chamber, but that during the spring and autumn vacations and Christmas recess, the whole thirteen Ordinary Lords of Session should officiate as Ordinaries on the Bills by rotation each week.[1] At that date the Court consisted of fifteen Judges, but by 1 Will. IV. cap. 69, sec. 20, the number of the Senators of the College of Justice was reduced to thirteen, viz.—the Lord President, the Lord Justice Clerk, and eleven other Judges.

The rule of 53 Geo. III. cap. 64, sec. 2, was altered by 2 & 3 Vict. cap. 36, sec. 7, which provided that "the whole business of "the Bill Chamber in the Court of Session falling to be per- "formed during the spring and autumn vacations of the said "Court, and during the Christmas recess, shall be performed, "in such rotation as the Court of Session by Act of Sederunt[2] "may fix, by the remaining six Judges of the Court of Session, "who shall not be Judges in the Court of Justiciary, with power "to all the Judges of the Court of Session in case of indisposition "or of absence of any of the said six Judges to act for him." At the date of the latter Act there were seven Lords Commissioners of Justiciary, being the Lord Justice General, the Lord Justice Clerk, and five Ordinary Lords, but by the Criminal Procedure (Scotland) Act, 1887,[3] all the Judges of the Court of Session were made Lords Commissioners of Justiciary, and the same Act further provided that every Senator of the College of Justice other than the Lord Justice General and Lord Justice Clerk should officiate in rotation as Lord Ordinary on the Bills in vacation. To this there was an exception in the case of the five Lords Commissioners of Justiciary other than the Lord Justice General and Lord Justice Clerk existing in the year 1887, but these Lords Commissioners have since died. Accordingly, all the Judges of the Court of Session, with the exception of the Lord President and the Lord Justice Clerk, now officiate in rotation as Lord Ordinary on the Bills in vacation. In

[1] 53 Geo. III. cap. 64, sec. 2.
[2] A.S., 8th August, 1839, sec. 1. The period of attendance is now fourteen days.
[3] 50 and 51 Vict. cap. 35, sec. 44.

session, the Junior Lord Ordinary is the Lord Ordinary on the Bills.

The Bill Chamber derives its name from the fact that it was formerly necessary to present a petition before a summons or a warrant for letters of diligence was issued, and this petition was called a Bill. The Bill was, in fact, the draft of the summons or letters of diligence, and the Bill Chamber was the *forum* where the Bill was presented and had to undergo examination before being passed into the Court of Session, or where it was revised and adjusted before letters of diligence were issued. It is not now, however, necessary to present a Bill prior to the raising of a summons, and Bills of Suspension, Suspension and Interdict, and Suspension and Liberation have been superseded by Notes to the same effect. Bills for Letters of Arrestment and Inhibition are now almost entirely rendered unnecessary in consequence of warrants for these purposes being introduced into the Wills of Summonses, and the recall of arrestments and inhibitions is now usually carried out by means of petition. Accordingly, procedure by way of Bill has gradually diminished and represents only a small portion of the business now transacted in the Bill Chamber. It still survives in certain special cases where letters of putting on or of loosing arrestment are required, and where certain warrants are needed, but the survival of this method of procedure, it is understood, is the result of an omission in the Personal Diligence Act of 1838. There still remains, however, some measure of the original jurisdiction of the Bill Chamber, and this is now represented in session and during vacation by Suspensions, Interdicts, and Liberations, and certain warrants and fiats issued either by the Lord Ordinary on the Bills or by the Clerk of the Bills, and during vacation by such Court of Session business as may be urgent. All such business is considered purely Bill Chamber business.

Much new business has been brought by subsequent statutes within the jurisdiction of the Bill Chamber. In particular, initial proceedings under the Bankruptcy Acts not brought before the Sheriff Court, and certain appeals under the same statutes are brought in the Bill Chamber, both in session and during vacation, and these are considered to fall under purely Bill Chamber business. Again, a great number of classes of petitions which formerly were presented in the Inner House

have now been remitted to the Junior Lord Ordinary to be dealt with by him in the Bill Chamber under the Distribution of Business Act, 1857, and the Clerks of Session (Scotland) Regulation Act, 1889, and there are also statutory applications which can only be brought in the Bill Chamber during vacation. The procedure of the statutory applications which do not fall under the head of purely Bill Chamber business is, however, quite different from the procedure in purely Bill Chamber business. The principal differences are with regard to the address of the application, printing, and review. Whereas in purely Bill Chamber applications the papers must be addressed to the Lord Ordinary on the Bills and may be in manuscript, in applications under the Distribution of Business Act the papers must be addressed to the Court and printed and boxed. As regards review, in purely Bill Chamber applications the reclaiming days are fourteen, whereas in applications under the Distribution of Business Act, the reclaiming days are eight. Another point is that the Inner House seems to be more of the nature of an advisory chamber in purely Bill Chamber proceedings than a Court of review, for although the Inner House may refuse a reclaiming note, it never recalls the decision of the Lord Ordinary on the Bills, but remits the note to the Lord Ordinary with instructions. Moreover, this course is always pursued in matters of expenses. While, therefore, applications in the Bill Chamber under the Distribution of Business Act retain most of the characteristics of the Court of Session, the differences of procedure in purely Bill Chamber business from that of the Court of Session rather point to the conclusion at which one authority on procedure has arrived, that "the Bill "Chamber, although generally called a department of the Court "of Session, may, perhaps, with stricter accuracy, be considered "a separate and distinct tribunal, of equal, or nearly equal, "antiquity."[1]

In vacation it has been claimed that the Bill Chamber possesses, by delegation, the whole powers of the Court of Session in all matters that do not admit of delay as well as in those matters that are for convenience, or by statute, specially placed under its jurisdiction. This claim has not always been conceded, and on more than one occasion the opinion has been expressed that

[1] Shand's Practice, p. 444.

the Lord Ordinary on the Bills in vacation has not so great powers as the Court of Session during session. This has been specially remarked with regard to the exercise of the *nobile officium* of the Court. However that may be, the present practice seems to be tending in the direction of allowing the Lord Ordinary on the Bills, in vacation, recess, and adjournment of the Court, to exercise all the powers of the Court in cases which admit of no delay, and in this respect it may be mentioned that the *nobile officium* of the Court was recently exercised by the Lord Ordinary on the Bills during session in a very urgent application addressed to the Court and made at a time when the Court had risen for the day.

The business of the Bill Chamber may thus be divided into three parts, viz.—*First.*—Purely Bill Chamber business, such as (*a*) Urgent common law business of the Court of Session arising during vacation; and (*b*) Suspensions, Suspensions and Interdicts, Suspensions and Liberations, Sequestrations, and applications for warrants and fiats authorising diligence, dealt with either by the Lord Ordinary on the Bills or by the Clerk of the Bills, and presented either in session or during vacation.

Second.—Business falling under the Distribution of Business Act, 1857, and the Clerks of Session (Scotland) Regulation Act, 1889, such as petitions for the appointment of Judicial Factors; and

Third.—Business of the Court of Session which by various statutes may be dealt with in vacation, such as applications under the Companies (Consolidation) Act, 1908.

The Bill Chamber office is situated in the western part of the New Register House, and is open in vacation as well as in session. The hours of attendance during the sitting of the Court are as follows:—From 10 o'clock forenoon to 12 o'clock noon, and from 2 to 4 o'clock afternoon, except on Saturdays, when there is no afternoon attendance.[1] During vacation, the hours of attendance are from 10 o'clock forenoon to 12 o'clock noon, and from 2 to 3 o'clock afternoon, except on Saturdays, when there is no afternoon attendance.[2]

There are four officials in the Bill Chamber—the Clerk of the Bills, the Assistant Clerk of the Bills, and two ordinary clerks.[3] During session, the Clerk of the Bills attends at the Lord

[1] C.A.S., E. I. 1.
[2] C.A.S., E. I. 2.
[3] 20 & 21 Vict. cap. 18, secs. 1 and 2.

Ordinary's Bar and in Court from 10 o'clock forenoon till 12 o'clock noon, and thereafter as long as any Bill Chamber case requires to be attended to there. He lays the papers lodged with him before the Lord Ordinary and writes the interlocutors therein, and if certificates of the interlocutors are required immediately, he furnishes them to the agent. He attends all hearings and debates, and writes the interlocutors in all cases not taken to avizandum. He receives the revised papers from the Lord Ordinary's Clerk, and as soon as possible sends them to the Register House. During session, when the Lord Ordinary is not in Court, and during vacation he transacts the above business with the Lord Ordinary at the Register House or at the Judge's house as the Lord Ordinary may direct, attending at the Register House when not required at the Judge's house.[1] The Clerk of the Bills also discharges all the duties which were formerly in use to be discharged by the Court clerk and the office clerk,[2] and is responsible for the reputed solvency of cautioners, and for consigned money.[3] The Assistant Clerk of the Bills acts under the orders of the Clerk of the Bills, and in the necessary absence of the Clerk subscribes and authenticates all such writs and documents as the Clerk of the Bills may, by law or practice, subscribe or authenticate.[4]

Although the Bill Chamber is open in vacation for the transaction, in addition to its own proper business, of Court of Session business of an urgent or statutory nature, it is not the practice for the Bill Chamber officials to deal with the latter class of work. The Bill Chamber officials deal with purely Bill Chamber applications as in session, but applications which in session would come before either the Inner or Outer House are prepared and lodged in the same way as if in session, and the particular Inner or Outer House clerks who would deal with them in session deal with them in vacation, the Lord Ordinary on the Bills in vacation being utilised in place of the Judge or Judges before whom such applications would be brought in session.

The Books of Record kept in the Bill Chamber include the Roll in which the names and designations of parties are entered; the Minute Book in which interlocutors passing, refusing,

[1] C.A.S., E. I. 3.
[2] A.S., 10th February, 1858, sec. 6; A.S., 15th July, 1842, secs. 4 and 5.
[3] 20 & 21 Vict. cap. 18, sec. 1.
[4] 20 & 21 Vict. cap. 18, sec. 2.

remitting or otherwise disposing of the case, decrees for expenses, and no others shall be entered; the Book of Accounts prescribed by section 2 subsection (6) of the Courts of Law Fees (Scotland) Act, 1895; a Transmission Book; and the various books required by the Bankruptcy (Scotland) Acts.[1]

The Lord Ordinary on the Bills sits in the Court on the fifth lawful day after each box day in vacation, but the business which he disposes of is not Bill Chamber business.[2]

[1] C.A.S., E. I. 4.

[2] Court of Session Act, 1868, sec. 93; C.A.S., A. I. 3.

CHAPTER II.

SUSPENSION.

I. Suspension Generally.—Suspension is the general name given to a process which has for its object the retention of matters in their present position until the rights of parties can be determined by a final judgment. It may be used as (1) an original proceeding, or (2) a method of review. The present chapter deals only with suspension as an original proceeding. Suspension as a method of review will be dealt with in a later chapter. See *infra* Chapter V.

II. Different Forms of Suspension as an Original Proceeding.—Suspension as an original proceeding is appropriate either (1) to stay diligence, or (2) to prevent the infringement of a right.

(1) *To stay diligence,* its form varies according to circumstances—

(*a*) Where a charge has been given on a decree, or on an extract of a registered bond, or a protest of a bill, and no further steps have been taken; or where a charge has been threatened; the proceeding adopted to stay diligence is called suspension;

(*b*) Where a charge has been given followed by a poinding, but no sale has taken place, the remedy takes the form of suspension and interdict;

(*c*) Where an expired charge has been followed by imprisonment, the remedy to be adopted is suspension and liberation; and

(*d*) Where an expired charge has been followed by both a poinding and imprisonment, the remedy is known as suspension, liberation, and interdict.

(2) *To prevent the infringement of a right,* suspension invariably takes the form of suspension and interdict.

Accordingly, suspension as an original proceeding will be exhaustively treated by being considered under the heads of Suspension, Suspension and Interdict, and Suspension and Liberation.

III. SUSPENSION. — (1) *Generally.* — Simple suspension is the appropriate remedy for, and is confined to, cases where a person who has been (*a*) threatened with a charge; or (*b*) charged on a decree, or on an extract of a registered bond or a protest of a bill, desires to adopt proceedings to stay diligence.

It is sufficient that a person has obtained a decree upon which execution may follow.[1] The charge need not be given; the mere fact that a charge is threatened is sufficient to enable the suspender to take proceedings.[2] Simple suspension continues to be the appropriate remedy where a charge has been given, and, even if the days of charge have expired, if nothing further is done,[3] but ceases to be appropriate when the charger has proceeded to poind or imprison.

A suspension is not competent after the charge has been withdrawn.[4] Where, however, the charger has abandoned his charge after the suspension has been raised, it is competent for the suspender to proceed until his expenses are paid;[5] and a mere verbal disclamation by the charger of his intention to charge is not sufficient to entitle the Lord Ordinary to repel the suspension of a threatened charge.[6]

(2) *Grounds of Suspension.*—These are (*a*) defects in the extract;[7] (*b*) defects in the charge;[8] (*c*) partial[9] or total payment of the sum charged for; or (*d*) any circumstances arising since the date of the decree which have partially or wholly extinguished the debt.

(3) *Jurisdiction.*—Previous to the Sheriff Courts (Scotland) Act, 1907, the Bill Chamber and the Court of Session thereafter

[1] *Lowson* v *Cooper or Reid*, 1861, 23 D. 1089, per Lord Curriehill at p. 1094.

[2] *Templeton* v *Templeton*, 1837, 16 S. 100; *Watson* v *Merrilees*, 1848, 10 D. 370.

[3] *Watson* v *Merrilees*, 1848, 10 D. 370.

[4] *Douglas* v *Brand & Brown*, 1853, 15 D. 283.

[5] *M'Aulay* v *Brown*, 1833, 11 S. 411; *Henderson* v *Plenderleath*, 1850, 12 D. 1076.

[6] *Templeton* v *Templeton*, 1837, 16 S. 100.

[7] Graham Stewart on Diligence, p. 278.

[8] *Ibid.*, p. 291.

[9] *Davidson* v *Dunbar*, 1821, 1 S. 43, (N.E. 46); *Ledingham* v *M'Kenzie*, 1824, 3 S. 113 (N.E. 74); *M'Martin* v *Forbes*, 1823, 3 S. 275 (N.E. 194); *Richan* v *Hill*, 1832, 11 S. 237; *Dick* v *Murison*, 1845, 8 D. 1; *Wilson* v *Stronach*, 1862, 24 D. 271; *Haughhead Coal Co.* v *Gallocher*, 1903, 11 S.L.T. 156.

had exclusive jurisdiction in suspension as a stay of diligence, except in cases where a charge had been given on a decree of registration proceeding upon any obligation registered in the Sheriff Court Books, or in the Books of Council and Session, or any others competent, or on letters of horning following on such decree, for payment of any sum of money not exceeding the sum of £25 of principal, exclusive of interest and expenses, in which case the person so charged might apply to the Sheriff Court of his domicile for suspension of said charge on caution. By the Sheriff Courts (Scotland) Act, 1907, however, the jurisdiction of the Sheriff Court has been extended, and now "Suspension of "charges or threatened charges upon the decrees of Court granted "by the Sheriff, or upon decrees of registration proceeding upon "bonds, bills, contracts, or other obligations registered in the "Books of the Sheriff Court, the Books of Council and Session, "or any other competent where the debt, exclusive of interest "and expenses, does not exceed £50"[1] are included in the jurisdiction of the Sheriffs of Scotland, and fall within their privative jurisdiction.[2] Where, however, the charge is fundamentally illegal, a suspension may be taken in the Bill Chamber,[3] and where the defender is not subject to the jurisdiction of the Sheriff Court the suspension must be raised in the Bill Chamber.[4]

In all other suspensions the Bill Chamber and thereafter the Court of Session have exclusive jurisdiction.

(4) *Form of Note.*—Unto the Right Honourable the Lords of Council and Session. Note of Suspension for A, merchant in B, against C, merchant in D. That the complainer has been charged (*or* is threatened to be charged) at the instance of the said C to make payment (*here narrate the charge*) most wrongously and unjustly, as will appear to your Lordships from the annexed statement of facts and note of pleas-in-law. That the complainer is willing to find caution, acted in your Lordships' books, in common form (*or* to find juratory caution, complying with the requisites of the Rules of Court thereanent, which is all

[1] 7 Edw. VII. cap. 51, sec. 5 (5). See also Rule 123.

[2] *Ibid.*, sec. 7; *Bryson* v *Belhaven Engineering and Motors, Ltd.*, 1908, 15 S.L.T. 1043; *Dickson & Walker* v *John Mitchell & Co.*, 1910, S.C. 139; *Wilsons & Clyde Coal Co.* v *Cairnduff*, 1911, S.C. 647.

[3] *Aitchison* v *M'Donald*, 1911, S.C. 174.

[4] *Pagan & Osborne* v *Haig*, 1910, S.C. 341; see also *Duke of Argyll* v *Muir*, 1910, S.C. 96; *Stevenson* v *Sharp*, 1910, S.C. 580.

that the complainer in his present situation and circumstances is able to find—*or*, is willing to consign the sum charged for—*or* that the complainer considers that, in the whole circumstances of the case, he is entitled to have this Note passed without caution or consignation).

May it therefore please your Lordships *simpliciter* to suspend the said (pretended decree and) charge, and whole grounds and warrants thereof; or to do otherwise in the premises as to your Lordships shall seem proper.—According to Justice, &c.[1]

The Note should be set forth in the words of the statutory forms.[2]

Annexed to such Note there must be an articulate statement of the facts on which such suspension is founded, together with a note of pleas-in-law.[3] There should be a full and complete statement of facts.[4]

(5) *Initial Procedure.*—The party complaining begins proceedings by preparing a Note of Suspension in the form already set forth and lodging it with a full copy of the same[5] in the Bill Chamber, together with his productions and other requisite steps of process. When received, the principal Note is marked by the Clerk of the Bills by appending thereto his signature and the date.[6] The principal Note is forthwith laid before the Lord Ordinary on the Bills "who shall pronounce such "order or interlocutor as may be just."[7] If there has been no caveat (see *infra*) lodged by the respondent, the Lord Ordinary may deal with the Note in either of the following ways:—

First.—The Lord Ordinary, after consideration of the Note, may be of opinion that it is manifestly incompetent, or that caution should have been offered by the complainer, in either of which case he may refuse the Note. Such a drastic proceeding, however, is very unusual, and the Lord Ordinary usually allows the Note to be intimated. Before doing so he may allow the Note to be amended to the effect of offering caution. Accordingly,

Second.—Where no caution or consignation is offered by the

[1] A.S., 24th December, 1838, sec. 16, Forms of Notes of Suspension, III.; C.A.S., E. II. 1 (c).

[2] *Hobbin* v *Burns*, 1904, 11 S.L.T. 681.

[3] Court of Session (No. 1) Act, 1838, (1 & 2 Vict. cap. 86), sec. 6.

[4] *Wyllie* v *Brand*, 1836, 14 S. 553.

[5] A.S., 24th December, 1838 (Bill Chamber), sec. 1.

[6] 1 & 2 Vict. cap. 86, sec. 6.

[7] *Ibid.*

complainer, and whether the Note is allowed to be amended as above mentioned or not, the interlocutor usually runs—

"To see and answer within —— days, and to be intimated."

Third.—Where the Note has been presented on ordinary caution or consignation, the usual interlocutor is—

"To see and answer within —— days, and to be intimated;
"meantime, on caution (*or* consignation) as offered,
"sists execution."

It is incompetent to pass a Note without caution when caution is offered.[1]

Fourth.—When the Note is presented on juratory caution, the Lord Ordinary, in addition to the interlocutor immediately preceding, names a Commissioner to take the complainer's deposition.[2]

Fifth.—Where the Note is presented on ordinary or juratory caution or consignation, but the complainer submits that, in the circumstances of the case, caution or consignation should be dispensed with, the Lord Ordinary may dispense with caution or consignation, in which case the interlocutor is—

"To see and answer within —— days, and to be intimated;
"meantime sists execution"; or
the Lord Ordinary may insist upon caution or consignation, in which event the interlocutor runs—
"To see and answer within —— days, and to be intimated;
"meantime, on caution (*or* consignation) as offered,
"sists execution."

If juratory caution is thought proper, the name of a Commissioner to take the complainer's deposition is added.

The Lord Ordinary may, however, reserve the question of caution or consignation, in which case the interlocutor will be—

"To see and answer within —— days, and to be intimated;
"meantime, sists execution, reserving the question of
"caution or consignation until answers (*or* until the
"Note comes to be advised with or without answers)."

Sixth.—In cases of suspension on the ground of forgery, where caution or consignation is offered, the interlocutor runs—

[1] *Nisbet* v *Gibson*, 1830, 3 Jur. 38.

[2] C.A.S., E. II. 13; A.S., 11th July, 1828, sec. 3; *Sinclair* v *Macmillan*, 1892, 30 S.L.R. 55.

"To see and answer within —— days, and to be intimated; "meantime, on caution (*or* consignation), as offered, "sists execution, and appoints the charger to produce "the bill (*or other document*) charged on, and the "suspender, genuine subscriptions in real trans- "actions bearing his signature, of date prior to the "charge."[1]

Seventh.—Where a Note is presented in which the complainer refers the whole question to the respondent's oath, no caution is required,[2] and there is added to the usual first interlocutor a clause sustaining the reference, appointing the respondent to appear and depone, and nominating a Commissioner to take the oath and to report.[3] Where the Note is passed on the oath, however, the case proceeds in the usual way, and caution must be found unless dispensed with.[4]

The first interlocutor having been pronounced and entered in the interlocutor sheets, the complainer's agent then copies the interlocutor therefrom into the copy of the Note of Suspension which he has lodged in process, and both the copy of the Note and the interlocutor are certified as correct by the Clerk of the Bills,[5] and form the warrant for service of the Note. At this time, the Clerk of the Bills usually enters in the Roll of Suspension kept in the Bill Chamber the name of the Lord Ordinary on the Bills to whom the Note is presented, the date of presentation, and the names and designations of the complainer and respondent, along with the name of the complainer's agent in the left hand margin, and also enters in the Minute Book the date of the interlocutor, the name of the Lord Ordinary on the Bills, the description of the case, the names of parties, and the nature of the interlocutor pronounced.[6]

(6) *Minute Book.*—The Minute Book is the book kept in the Bill Chamber where all interlocutors or orders are entered.[7] Entering an interlocutor or order in the Minute Book is termed reading in the Minute Book. Formerly no entry was made in

[1] *Warden* v *British Linen Co.*, 1863, 1 M. 402 (Session Papers).

[2] *Larkin* v *Smith*, 1823, 2 S. 114 (N.E. 105).

[3] *Thomson* v *Wyld*, 1840, 3 D. 150 (Session Papers).

[4] *Gilbertson* v *Ballantine*, 1851, 13 D. 995.

[5] A.S., 24th December (Bill Chamber), 1838, sec 1.

[6] Beveridge on the Bill Chamber, p. 50, and Appendix No. xxiv., p. 46, C.A.S., E. 1. 4; A.S., 15th July, 1842, sec. 8.

[7] Beveridge on the Bill Chamber, p. 50; A.S., 19th December, 1778; A.S. 15th February, 1842, sec. 8; C.A.S., E. I. 4.

the Minute Book after 1 p.m.,[1] but this practice has now been departed from.

(7) *Intimation of Notes.*—All notes in the Bill Chamber requiring intimation shall be intimated to the agent of the opposite party, by delivering to him personally, or leaving at his dwelling-place or chambers, a copy thereof, and the certificate of intimation shall specify the time of the day at which this was done; and the Clerk of the Bills shall not lay the Note before the Lord Ordinary without such certificate, nor sooner than twenty-four hours at least after such intimation, and shall not issue a certificate of refusal until the Note shall be disposed of.[2]

(8) *Service on the Respondent.*—A full copy of the Note of Suspension along with the order or interlocutor pronounced by the Lord Ordinary on the Bills[3] is served upon the respondent either by a messenger-at-arms,[4] or a sheriff officer where a messenger is not available[5] in common form, or by post in terms of the Citation Amendment (Scotland) Act, 1882.[6]

A messenger-at-arms or sheriff officer when serving such copy Note and interlocutor does not, for various reasons, require to have in his possession the original Note. In the first place, the original Note cannot be borrowed for this, or any purpose,[7] and in the second place, it does not contain the interlocutor ordering intimation. The certified copy of the Note, however, has written upon it a certified copy of the interlocutor, and this is sufficient warrant for the messenger or sheriff officer. Moreover a copy of the Note certified as correct by the agent in the cause is sufficient warrant.[8]

If it is not served within fourteen days from the date of the interlocutor, the Note is held to have fallen.[9]

(9) *Execution of Service.*—The execution is written upon the certified copy Note of Suspension, and should be in the form set forth in the Court of Session Act, 1850, Schedule B, or the First Schedule of the Citation Amendment (Scotland) Act, 1882. If service is accepted by the respondent's agent, such acceptance should also be written on the certified copy Note.

[1] A.S., 11th July, 1828, sec. 13.
[2] C.A.S., E. II. 5; A.S., 11th July, 1828, sec. 20.
[3] 1 & 2 Vict. cap. 86. sec. 6; *Anderson* v *Drysdale*, 1862, 1 M. 46; *cf. Robertson* v *M'Donald*, 1829, 7 S. 272; *Clark* v *Stirling*, 1839, 1 D. 955.
[4] 1 & 2 Vict. cap. 86, sec. 6.
[5] Court of Session Act, 1868, sec. 19.
[6] 45 & 46 Vict. cap. 77.
[7] C.A.S., E. II. 3.
[8] Court of Session Act, 1868, sec. 16.
[9] *Fraser* v *Gordon*, 1834, 12 S. 380.

Execution of the Note otherwise than by post requires the signature of a witness.[1]

Great care should be taken in the service and execution of the same, as a respondent entering appearance may nevertheless state objections to the regularity of the service or execution, section 21 of the Court of Session Act, 1868, having reference only to any action or proceeding in the Court of Session and not in the Bill Chamber.

(10) *Caveat.*—Where a person is apprehensive that a Note of Suspension will be presented, and is desirous of being heard before the Lord Ordinary on the Bills pronounces any order or interlocutor, he may lodge with the Clerk of the Bills a caveat in the following terms:—

"Should any application for suspension (*or* suspension and "interdict, &c.) be presented at the instance of A. B. "against C. D. it is requested that notice be given "to the subscriber before any order is pronounced "thereon."

(Signature of C. D.'s Agent.)

(Address of C. D.'s Agent)

(Date).

The presentation of such a caveat ensures a hearing of parties before any order is pronounced by the Lord Ordinary on the Bills. After the hearing the parties may proceed in the same manner as where no caveat has been lodged.

A caveat endures for one month, but may be renewed by the presenter dating it anew.

(11) *Sist.*

(*a*) *Effect of Sist.*—Where a sist of execution is included in the first interlocutor, and there is no order for caution or consignation, the effect of the sist is to stop diligence immediately upon intimation of the interlocutor to the respondent. A sist of execution where the question of caution or consignation is reserved has the same effect. Where, however, the sist is granted "on caution or consignation" there is considerable diversity of opinion as to whether upon intimation to the respondent the sist has an

[1] 1 & 2 Vict. cap. 114, sec. 32; 9 & 10 Vict. cap. 67; 13 & 14 Vict. cap. 36, Schedule B; *Allan* v *Miller*, 1848, 10 D. 1060.

immediate effect to stay diligence, or whether the sist of execution does not become effective until caution is found or consignation made. In an early case[1] it was held that a sist did not stop incarceration. This, it is presumed, was because caution for the suspender's appearance had not been found. In a later case in the year 1828,[2] the point arose but was not decided, and in the same year where a charger had proceeded to poind notwithstanding an intimated sist "on caution only and not otherwise" before caution had been found, the Court held that there was no room for a charge of contempt of Court,[3] although in the same case two years later it was held that the poinding was illegal.[4] It has been held, however, quite recently that an *interim* interdict upon caution does not take effect until caution has been found.[5] *Interim* interdict and a sist of execution seem to be analogous cases, for although a Note of Suspension and a Note of Suspension and Interdict are not in detail similar, it is curious to note that with regard to fixing the Lord Ordinary and Division a Note of Suspension and Interdict is expressly put in the same position as a Note of Suspension when interdict has been granted in the Bill Chamber and is unrecalled.[6] Again, if an interlocutor ordering intimation contains an *interim* sist of execution or *interim* interdict on caution, the *inducicæ legales* for answers do not begin to run until caution has been received by the Clerk,[7] and where caution has to be found after the passing of a Note, the interlocutor passing the Note does not take effect until caution has been found.[8] All of which rather point in the direction that a sist upon caution or consignation does not take effect until caution has been found or consignation made.

It is necessary that intimation of a sist should be

[1] *Gillespie* v *M'Dougal*, 1776, 5 Brown's Supp. 456.
[2] *Tait* v *Gordon*, 1828, 6 S. 1056.
[3] *Keltie* v *Wilson*, 1828, 7 S. 208.
[4] *Keltie* v *Wilson*, 1830, 8 S. 527.
[5] *Wilson* v *Gilchrist*, 1900, 2 F. 391.
[6] Court of Session Act, 1850, sec. 33.
[7] C.A.S., E. II. 6; A.S., 11th July, 1828, sec. 12.
[8] C.A.S., E. II. 21; A.S. (Bill Chamber), 24th December, 1838, sec. 8.

made to the respondent, or his agent, in order that it may have any effect.[1]

While an intimated sist will stop poinding,[2] imprisonment,[3] or removing,[4] it does not prevent arrestment, inhibition, or adjudication,[5] or the granting of a warrant to cite the debtor in a petition for sequestration.[6]

An intimated sist stops the running of the days of charge.[7]

Where a sist of execution has been recalled, the days of charge, if a charge has been made, proceed to run as if they had not been interrupted by the sist.[8]

Where a sist has been recalled as a result of a refusal of the suspension, it is advisable to obtain a certificate of refusal before doing any, or further, diligence.[9]

(*b*) *Endurance of Sist.*—Where at the presentation of a Note a sist is granted without caution, it endures until the hearing of the Note on answer, when, if the Note is passed and the *interim* sist is continued *simpliciter*, it endures until the end of the cause or until recalled.[10] If, however, a sist is granted at the presentation of a Note without caution, and the Note is only passed on caution, and the *interim* sist is continued, fourteen days from the date of the interlocutor passing the Note are allowed within which to find caution, and during this period the sist endures.[11] If caution is found, the sist continues until the end of the cause or until recalled. If caution is not found, the sist endures until a certificate of no caution is issued. A Note asking for prorogation of the time for finding

[1] *National Bank of Scotland* v *Johnston*, 1842, 5 D. 205; *Anderson* v *Anderson*, 1855, 17 D. 804.

[2] *Stewart* v *Stewart*, 1751, Mor. 10535; *Keltie* v *Wilson*, 1828, 7 S. 208.

[3] Graham Stewart on Diligence, p. 755.

[4] *Tait* v *Gordon*, 1828, 6 S. 1056.

[5] *Miller* v *Wilson*, 1749, Mor. 15148; *Henderson* v *Smith*, 1750, Mor. 6563; *Matheson* v *Simpson*, 1822, 1 S. 542 (N.E. 498); *Clyne* v *Murray*, 1831, 9 S. 338.

[6] *Train* v *Steven*, 1904, 7 F. 47.

[7] *Pet., Laird* v *Scott*, 1913, 2 S.L.T. 409.

[8] *Clark* v *Monteith*, 1885, 12 R. 939.

[9] *Wilson* v *Thomson*, 1824, 2 S. 762 (N.E. 633).

[10] *M'Allister* v *M'Gallagley*, 1910, 2 S.L.T. 163.

[11] *Cassells* v *Sillers*, 1910, 2 S.L.T. 447; A.S., 3rd July, 1677.

caution may be presented prior to the issue of the certificate of no caution, in which case the sist continues until the last mentioned Note is disposed of. In the same way where the Note is passed on caution and the *interim* sist is continued, the complainer may present a Note for leave to substitute juratory caution, in which case the sist endures until such Note is disposed of. Where the Note is refused at the hearing on answer and the *interim* sist is recalled, the sist endures until a certificate of refusal has been issued.[1]

Where a sist is granted reserving the question of caution until the Note is heard on answer, the sist endures until the hearing takes place. If the Note is passed without caution and the *interim* sist is continued the sist endures until the end of the cause or until recalled. If the Note is only passed on caution and the *interim* sist is continued, fourteen days from the date of the interlocutor passing the Note are allowed within which caution must be found, and during this period the sist endures.[2] If caution is found, the sist endures until the end of the cause or until recalled. If caution is not found, the sist endures until the certificate of no caution is issued. A Note asking for prorogation of the time for finding caution may be presented as above mentioned and with the same effect. If the Note is refused at the hearing on answer, and the *interim* sist recalled, the sist endures until a certificate of refusal has been issued.[3]

Where at the presentation of the Note a sist is only granted on caution, it would rather appear that it does not operate until caution is found, see *supra*, pp. 15 and 16. Fourteen days are allowed for finding caution. If caution is found, the sist comes at once into operation and continues until the hearing on answer, when, if the Note is passed and the *interim* sist continued, the sist endures until the end of the

[1] *Wilson* v *Thomson*, 1824, 2 S. 762 (N.E. 633).
[2] A.S., 3rd July, 1677.
[3] *Wilson* v *Thomson*, 1824, 2 S. 762 (N.E. 633).

cause or until recalled. If caution is not found within fourteen days the Note of Suspension is refused[1] and the sist never comes into operation.

Where a sist is not granted at the presentation of the Note, but is granted at the passing of the Note without caution, the sist endures until the end of the cause or until recalled. Where a sist is only granted at the passing of the Note and that on caution, the sist does not come into operation until caution has been found.[2] If caution is found, the sist endures until the end of the cause or until recalled.

(12) *Caution.*

(*a*) *Distinction between Caution and Consignation.*—The principal distinction in practice is that, where caution is ordered, not only must caution be found for the sum charged for, but also for the expenses of the respondent;[3] whereas, if consignation is ordered, the sum charged for alone is all that requires to be consigned.

(*b*) *Procedure to obtain Caution.*

(i.) *Generally.*—Wherever the interlocutor of the Lord Ordinary, either sisting execution on caution or passing the Note on caution, has been pronounced, it is the duty of the complainer forthwith to set about providing caution. For this purpose he should at once obtain from the Clerk of the Bills a bond of caution, and thereafter follow the directions given by Lord Wood in a case in the year 1860, the terms of which are still applicable:—"It "appears from the proof which has been led that, "in conformity to the established practice, the "bond, as at first given out from the Bill Chamber, "is partly printed; that there is a blank space at "the commencement where the names and designations of the cautioners or cautioner are to be "inserted, and a blank space for the subscription "or subscriptions and testing clause; and that in "no part of it is there any word indicating its

[1] A.S., 11th July, 1828, sec. 12; C.A.S., E. II. 6.

[2] C.A.S., E. II. 21; A.S. (Bill Chamber), 24th December, 1838, sec. 8.

[3] C.A.S., E. II. 7; A.S., 23rd November, 1613.

"being to be a bond by one party only as cautioner, "or more than one. In this state it is delivered to "the complainer in the suspension, upon whom it "then falls to procure the subscription of the party "or parties who are to become cautioners, and "having done so, his duty is to return the bond "with a note of the designation or designations of "the party or parties subscribing; and the requisite "information for filling up the testing clause, "which, upon the Bill Chamber Clerk being "satisfied of the sufficiency of the cautioner or "cautioners, is then done."[1] Perhaps the only difference now is that the Clerk of the Bills, being responsible for the filling in of the blank spaces in the printed bond, also sees that these are properly filled up by the complainer, or else fills them in himself.

(ii.) *Form of Bond of Caution.*

The bond is in the following terms:—

"I , bind and oblige ,
"heirs, executors, and successors , as
"cautioners and surety, acted in the Books of
"Council and Session, for , That
" ,[2] or to any other person[3] to
"whom shall be ordained to
" , as stated in a Note of Suspension
"between the said parties presented on the
"day of nineteen hundred and
"years; and that, in case it shall be found by the
"Lords of Council and Session that ought
"so to do, after discussing the passed Note of
"Suspension; and also, that payment shall be made
"of whatever sum the said Lords shall modify in
"name of damages——and expenses in case of
"wrongous suspending. Consenting to the regis-
"tration hereof in the Books of Council and
"Session, that all legal execution may pass
"thereon.—In witness whereof, these presents

[1] *Simpson* v *Fleming*, 1860, 22 D. 679, at p. 684.

[2] C.A.S., E. II. 8; A.S., 29th January, 1650.

[3] C.A.S., E. II. 9; A.S., 23rd November, 1717.

"written by Clerk to , Clerk of
"the Bills,[1] so far as not printed, are subscribed
"(testing clause in usual style)."

(iii.) *Certificate by Justice of Peace or Magistrate.*—Accompanying the Bond of Caution there must be lodged a certificate from a Justice of the Peace or Magistrate certifying that the cautioner is habit and repute responsible for the obligation contained in the bond. Such certificate must be holograph and may either be written on the Bond of Caution itself, or on a separate paper, which sufficiently identifies the Bond of Caution. The certificate is in the following terms:—

"I, A. B., one of His Majesty's Justices of the
"Peace for the County of (*or*, one of
"the Magistrates of) hereby certify
"that I know , the within designed
"cautioner (*or, if on a separate paper, give full
"description of the cautioner*), and that he is habit
"and repute responsible for the obligations con-
"tained in the within bond (*or, if on a separate
"paper, fully describe the bond*)."

A. B. (J.P. or Magistrate).

(iv.) *Intimation of Bond to Respondent.*—As it is the privilege of the respondent to object to the sufficiency of the cautioner or cautioners, should he think fit,[2] the complainer's agent, when he lodges the signed Bond of Caution with the Clerk of the Bills, must intimate to the agent for the respondent that the Bond of Caution is in the Clerk's hands, and he must also lodge with the Clerk a certificate of such intimation.[3]

(v.) *Objections to the Bond of Caution.*—Although the Bond of Caution is a document offered by the complainer in order to induce the Lord Ordinary on the Bills to pass the Note of Suspension, the respondent has a right to state objections

[1] C.A.S., E. II. 11; A.S., 14th June, 1799, sec. 3.

[2] *Simpson* v *Fleming*, 1860, 22 D. 679, per Lord Wood, at pp. 683 and 685.

[3] C.A.S., E. II. 17; A.S., 14th December, 1799, sec. 4.

to the sufficiency of the caution offered.[1] The judge of the sufficiency of the caution is the Clerk of the Bills, who may *ex proprio motu* object to the caution offered. His decision, however, is not final, and either party to the suspension may appeal from his decision by a written note to the Lord Ordinary on the Bills craving that the Clerk be ordained to receive or refuse the caution, as the case may be.[2]

The objections of the respondent should take the form of a letter to the Clerk of the Bills formally stating the objections.

(vi.) *Attestor.*—The respondent is also entitled to have an attestor to the Bond of Caution, and of this right the respondent almost invariably avails himself. It is, accordingly, the duty of the Clerk of the Bills to take the attestor bound as cautioner, and liable *subsidiarie* as fully as the cautioner himself.[3] The attestation, which forms part of the Bond of Caution, is in the following terms:—

"I, A, do hereby not only certify and attest the "sufficiency of the within designed B as cautioner "in the manner within expressed, but also bind and "oblige myself, my heirs, executors, and successors "as cautioners and surety *subsidiarie* along with "him for the within designed complainer, in "manner within specified; and I consent that this "attestation be recorded along with the within "bond, in terms of the clause of registration therein "contained, and to the effect within mentioned. "In witness whereof these presents written on the "back of said bond by , in so far as "the same are not printed, are subscribed," &c.

The attestor must be certified by a Justice of the Peace or Magistrate in the way and according to the same form (see *supra*) as the cautioner in the bond itself. Where the attestation is executed at the same time as the bond, a single certificate certifying both cautioner and attestor is sufficient.

[1] *Simpson* v *Fleming*, 1860, 22 D. 679.
[2] Stair iv. 52, 10.
[3] C.A.S., E. II. 10; A.S., 27th December, 1709.

There is no responsibility upon the Justice of the Peace or Magistrate in signing the certificate, provided he does so *in bona fide*.[1]

An attestor is entitled to have the complainer and the cautioner discussed before recourse is made against him.[2]

Where a complainer in a suspension and his cautioners became bankrupt during the dependence, and the trustee on the complainer's estate refused to sist himself, the attestor in a bond of caution was held entitled to be sisted as a party without finding caution.[3]

(*c*) *Amendment of Note as Regards Caution.*—In all Notes of Suspension, Suspension and Interdict, or Suspension and Liberation, presented without caution, or on juratory caution, or on consignation, it is competent to the party at any time before such Note is advised upon answers to amend his Note, to the effect of offering juratory caution,[4] in the case where no caution has been previously tendered, or consignation, or full caution,[5] as the case may be, by lodging a Minute to that effect, duly intimated to the agent for the opposite party; or he may afterwards correct the same, with special leave of the Lord Ordinary or the Court, given after hearing both parties on the point; provided always, when Notes of Suspension are so amended, that it shall be in the power of the Lord Ordinary and the Court to give any order as to the expenses occasioned by the presentment of the Note in its original shape that may appear to them to be just, with power to their lordships also to limit the time for finding caution or making consignation to such period as shall appear to be proper in the circumstances of the case; and if any Note, as thus corrected, is afterwards refused for want of the caution or consignation offered, no second Note to the Lord Ordinary shall be competent, as

[1] Beveridge on the Bill Chamber, p. 33, sec. 152.
[2] *Ibid.*, p. 36, sec. 164.
[3] *Addison* v *Brown*, 1910, 1 S.L.T. 185.
[4] *Anderson* v *Somerville, Murray & Co.*, 1898, 1 F. 90 (Session Papers).
[5] *Cassells* v *Sillers*, 1910, 2 S.L.T. 447.

allowed in other causes by the Codifying Act of Sederunt, 1913, E. II. 20.[1]

In the same way it is competent to the complainer to amend his Note by praying that ordinary caution or consignation as originally offered may be restricted to juratory caution.[2] Both of these Notes must be intimated to the respondent's agent in terms of C.A.S., E. II. 5.[3]

(*d*) *Time within which Caution must be Found.*—Caution must be found within 14 days of the date of the interlocutor ordering caution, whether the interlocutor is a first interlocutor allowing a sist on caution, or an interlocutor passing the Note on caution.[4]

(*e*) *Prorogation of Time for Finding Caution.*—Formerly where fourteen days had elapsed without the complainer finding sufficient caution, a Note could be given in by the complainer stating the fact shortly, and that the delay had not arisen through the wilful negligence or fault of the complainer, or his agent, and craving a prorogation of the sist so as to afford sufficient time to find caution; and a sum not exceeding £5 (usually 25s.)[5] was consigned in the Clerk's hands to answer for expenses in the Bill Chamber, if awarded; and the Lord Ordinary could prorogate the sist of a further period, not exceeding ten days, in order that the complainer might, within that time, either procure sufficient caution or amend his Note by praying that it should be passed on juratory caution. One application for such prorogation was competent in the Bill Chamber.[6]

Such a Note is still competent, but in practice the consignation is now departed from, and there seems to be no limit to the number of times that prorogation may be granted. The Note requires to be intimated in terms of C.A.S., E. II. 5.

(*f*) *Rights and Duties of a Cautioner.*—A cautioner in a

[1] C.A.S., E. II. 16; A.S. (Bill Chamber), 24th December, 1838, sec. 4.
[2] A.S., 14th June, 1799, sec. 1.
[3] A.S., 11th July, 1828, sec. 20.
[4] A.S., 3rd July, 1677; A.S., 14th June, 1799, sec. 1; C.A.S., E. II. 6; A.S., 11th July, 1828, sec. 12; 1 & 2 Vict. cap. 86, sec. 6.
[5] Beveridge on the Bill Chamber, p. 34.
[6] A.S., 14th June, 1799, sec. 1.

suspension is a party to the cause.[1] Accordingly he has a *persona standi* and may appear for his own interest and take up the case. He may come forward when the complainer has abandoned the cause and carry it on to final judgment;[2] and, when the complainer has been awarded decree of suspension, the cautioner may be awarded expenses in his own name for money which he has advanced to the complainer for that purpose.[3] In the same way, although the complainer is *dominus litis* and may carry on the suspension according to the ordinary procedure, and for this the cautioner will be bound, yet if any extraordinary procedure is adopted, such as a judicial reference without the knowledge and consent of the cautioner,[4] or a relative conjoined reduction in which the cautioner does not appear,[5] the cautioner is relieved of his obligation.

Moreover, a cautioner is also relieved of his obligation if the respondent asks for new caution;[6] and, if the complainer has been discharged from bankruptcy, his cautioner will be relieved from his obligation for the principal sum in the bond.[7]

Although the respondent has only obtained a decree against the complainer, the former may charge the cautioner directly upon said decree, although his name does not appear in said decree or in the extract.[8]

A cautioner may be liable for damages as well as expenses where the Note of Suspension is not *bona fide*.[9]

Where a trustee binds himself *qua* trustee in a bond of caution in a suspension, he has been held personally liable in the expenses of the respondent.[10]

The old rule was that a cautioner must be within the jurisdiction of the Court,[11] but this rule has been

[1] *Potter* v *Bartholomew*, 1847, 10 D. 97 per L.J.C. Hope, p. 100, and Lord Moncreiff, p. 108.

[2] *Eadie* v *Smith*, 1833, 11 S. 421, per Lord Craigie.

[3] *Henderson* v *Young*, 1828, 7 S. 142.

[4] *Stewart* v *Hickman*, 1843, 6 D. 151. See also *Potter* v *Bartholomew*, 1847, 10 D. 97.

[5] *Adam* v *Denny*, 1829, 7 S. 447.

[6] *Eadie* v *Smith*, 1833, 11 S. 415.

[7] *Boyd* v *Napier*, 1831, 9 S. 260.

[8] *Potter* v *Bartholomew*, 1847, 10 D. 97.

[9] *Buchanan* v *Douglas*, 1851, 13 D. 547; 1853, 15 D, 365. See also *Knox* v *Paterson*, 1861, 23 D. 1263.

[10] *Stewart* v *Forbes*, 1897, 24 R. 1112.

[11] *Collins* v *L. Boyd*, 1759, Mor. 4648.

relaxed in several recent cases.[1] In each of the latter cases the cautioner submitted himself to, and prorogated, the jurisdiction of the Court of Session and assigned a place of citation in Scotland.

A cautioner may resile from his bond while it remains unaccepted,[2] but where the bond of caution was given in before answers were lodged, and the Note was refused, but on a reclaiming Note was passed on caution, it was held that the cautioner could not resile.[3]

(*g*) *Responsibility of the Clerk of the Bills.*—By the Bill Chamber Procedure Act, 1857,[4] the Clerk of the Bills is made responsible for the reputed solvency of cautioners, but this has been interpreted to mean only that the Clerk of the Bills is responsible for the bond of caution being *ex facie* legally executed. It is certainly part of his duty to exercise a general supervision over the finding of caution, and to decide upon any objections made by the respondent to the sufficiency of caution, but it has been held that he is not responsible if the caution should turn out to be insufficient, or if the signature of the cautioner is forged.[5]

The Court does not usually interfere with the discretion exercised by the Clerk of the Bills in judging of the sufficiency of caution.[6]

(*h*) *New Caution may be Required.*—In every process of suspension of a liquid obligation, in which caution has been or may hereafter be found, it is competent to the party entitled to the benefit thereof, in case the cautioner shall have been sequestrated or become notour bankrupt, or have executed a trust disposition for behoof of his creditors, or have called a meeting of his creditors to consider the state of his affairs, or shall have died unrepresented, to present a Note, the same being previously intimated in common form, stating the circumstances which have emerged,

[1] *Reid* (*Gavin Stewart's Trustees*) v *Stewart*, August, 1905, and other unreported cases.

[2] *Stewart* v *Mitchell*, 7th February, 1786, F.C.

[3] *Crawford* v *Lynde*, 26th May, 1819, F.C.

[4] 20 & 21 Vict. cap. 18. sec. 1.

[5] *Simpson* v *Fleming*, 1860, 22 D. 679.

[6] *Gow* v *Napier*, 1832, 10 S. 812.

and praying the Division in which the proceeding may for the time depend to order new caution to be found; and the Division shall pronounce such order thereon as the justice of the case shall require.[1]

Such an application has the effect of setting free the original cautioner altogether.[2]

(*i*) *Prescription.*—The septennial limitation does not apply to bonds of caution in the Bill Chamber.[3]

(*j*) *Failure to Find Caution, &c.*—Where a Note of Suspension is presented on caution or consignation, and caution has not been found, or consignation made within fourteen days of the first interlocutor or order, the respondent may lodge in process a Note stating the facts and craving that the Note of Suspension should be refused. Intimation of such Note should be made to the complainer, who may in reply lodge a Note asking for a prorogation of the time of lodging caution or making consignation, or craving that he should be allowed to restrict to the effect of having the Note of Suspension passed on juratory caution alone. If, however, the complainer makes no answer to the respondent's said Note, an interlocutor is pronounced refusing the Note of Suspension and finding the complainer liable in expenses. A certificate of refusal of the Note of Suspension may then be issued, but not until forty-eight hours have elapsed after the entry of the interlocutor refusing the Note in the Minute Book.[4]

Instead of proceeding by way of Note the respondent may enrol the case on the Bill Chamber Motion Roll in Court, if in session, or in the daily roll made up in the Bill Chamber, in vacation.

Where a Note of Suspension is passed on caution or other condition, and no caution is found, or other condition purified, within fourteen days from the date of the interlocutor passing the Note, the respondent may intimate formally to the complainer's agent his intention of applying twenty-four hours thereafter

[1] C.A.S., E. II. 12; A.S., 11th July, 1828, sec. 118.
[2] *Eadie* v *Smith*, 1833, 11 S. 415.
[3] *M'Kinlay* v *Ewing*, 1781, Mor. 2154.
[4] C.A.S., E. II. 21; A.S. (Bill Chamber), 24th December, 1838, sec. 8.

to the Clerk of the Bills for a certificate of no caution or non-implement. On the lapse of this period[1] the respondent's agent may apply at the Bill Chamber for the certificate of no caution and lodge the certification of his intimation to the complainer's agent. Strictly speaking, if the complainer's agent has not in the meantime lodged a Note asking for prorogation of the time for lodging caution or for a prohibition, on special cause shown, of the issue of the certificate of no caution, the respondent is entitled to obtain his certificate. This is done by presenting at the Bill Chamber a short copy of the Note with a copy of the interlocutor ordering caution or making any other condition, and these having been certified by the Clerk of the Bills, the latter writes the certificate of no caution or non-implement on the copy Note, which is thereupon lodged in process. A practice has, however, grown up in the Bill Chamber of not issuing the certificate of no caution or non-implement at the expiry of twenty-four hours after the intimation to the complainer's agent, and it is not issued until the expiry of other twenty-four hours. In other words the certificate of no caution or non-implement is issued at the expiry of forty-eight hours after the date of the intimation to the complainer's agent unless in the meantime the complainer has lodged one or other of the Notes above mentioned. It is not necessary for the Clerk of the Bills to have a warrant from the Lord Ordinary to issue the certificate of no caution or non-implement.[2]

Having obtained the certificate of no caution or non-implement, the respondent may move for expenses, and the usual interlocutor is in the following terms:—

"In respect the complainer has failed to find "caution (*or, to fulfil any other condition*) in terms "of the Act of Sederunt, and certificate to that effect "having been issued and now produced, find the "complainer liable in expenses," &c.

[1] C.A.S., E. II. 22; A.S. (Bill Chamber), 24th December, 1838, sec. 9.

[2] *Nairne* v *Spence*, 1824, 3 S. 228 (N.E. 160).

Where by accident an attested bond of caution was not received until the morning after the expiry of the fourteen days and after a certificate of no caution had been granted, the Court allowed the bond to be received.[1] Where no excuse was given in such circumstances the bond was not allowed to be received.[2]

(*k*) *Recall of Certificate of no Caution.*—Where a certificate of refusal on the ground of no caution, or consignation, or non-implement of any kind, has been issued but no interlocutor awarding expenses has followed thereon, the complainer may competently present a Note craving to be allowed to implement the interlocutor ordering caution, &c., and to recall the said certificate, but recall will only be granted for very cogent reasons.[3]

(*l*) *Second Note of Suspension.*—There is another remedy besides a Note for recall (see *supra*) which a complainer may adopt in order to be reponed against a certificate of no caution or non-implement, which has not been followed by an interlocutor awarding expenses, and that is by a second Note of Suspension.

"When any Note of Suspension, or of Suspension "and Interdict, or Liberation, shall, either during "session or vacation, be refused, in respect that "caution has not been offered or found, or upon any "ground not on the merits; and likewise where such "Note shall have been passed, and a certificate of no "caution or consignation, or other failure to imple- "ment any condition of such interlocutor, has been "issued, it shall be competent (excepting only in the "cases specified in C.A.S., E. II., 16) on payment of "previous expenses, to present a second Note of "Suspension, the procedure upon which shall be the "same as is provided in the Act of Sederunt, 24th "December, 1838, with regard to Notes of Suspension, "and Suspension and Interdict, or Liberation."[4]

[1] *Harper* v *Balfour*, 1832, 10 S. 248.
[2] *Bain* v *Gordon*, 1833, 11 S. 307.
[3] *Andrew* v *Colquhoun*, 1853, 15 D. 482; *Cassells* v *Sillers*, 1910, 2 S.L.T. 447.
[4] C.A.S., E. II. 20; A.S. (Bill Chamber), 24th December, 1838, sec. 7.

Where the certificate has been followed by a decree for expenses this is the only remedy open to the complainer, as a reclaiming note is incompetent.[1]

(*m*) *Third Note of Suspension.*—A third Note of Suspension is not competent[2] except there has been a change of circumstances.[3]

See Second Note of Suspension supra (*l*).

(*n*) *Caution dispensed with.*—Caution is the usual condition upon which a suspension is passed. Thus, although caution may be dispensed with on a reference to oath,[4] yet where the Note is passed on the oath caution must be found unless it is specially dispensed with, even where no reference is made to caution in the interlocutor passing the Note.[5]

Accordingly caution is only dispensed with in special circumstances.[6]

It has been dispensed with in the following cases:—

Where there is a manifest departure on the part of the charger from the statutory forms;[7] where the charge is obviously bad, as where the charge is by a married woman without her husband's concurrence,[8] or where the bill charged upon is clearly a forgery.[9]

Where security is otherwise found.[10]

Where the property poinded was clearly the property of the suspender and not of the person against whom the charger held a decree.[11]

Where on a reference to oath of the charger regarding payment of the debt by the suspender, the result was such that the case was not cleared up to support the charge.[12]

Where a promissory note was obtained by the charger as the price of his concurrence in the complainer's discharge on a composition contract.[13]

[1] *Purdie* v *Bryson*, 1861, 24 D. 85.

[2] *Corsan* v *Holms*, 1829, 8 S. 114; *Coats* v *Jackson*, 1829, 8 S. 229; *Wight* v *Jameson*, 1830, 8 S. 669; *Stewart* v *Ferguson*, 1841, 3 D. 668, per Lord Ivory at p. 672 (note).

[3] *Wallace* v *Grant*, 1825, 3 S. 539 (N.E. 372); *Stewart* v *Ferguson*, 1841, 3 D. 668.

[4] *Larkin* v *Smith*, 1823, 2 S. 114 (N.E. 105).

[5] *Gilbertson* v *Ballantine*, 1851, 13 D. 995.

[6] *Ibid.*, per L.J.C. Hope, p. 996.

[7] *Gadois* v *Baird*, 1856, 28, Jur. 682. See also *Aitchison* v *Thorburn*, 1869, 6 S.L.R. 604.

[8] *Wight* v *Dewar*, 1827, 5 S. 549 (N.E. 516).

[9] *Ross* v *Millar*, 1831, 10 S. 95.

[10] *Fisher* v *Stewart*, 1825, 3 S. 607 (N.E. 426).

[11] *Fyfe* v *Woodman*, 1841, 4 D. 255.

[12] *Thomson* v *Wyld*, 1840, 3 D. 150.

[13] *Thompson* v *Robertson*, 1825, 4 S. 137 (N.E. 139).

(13.) *Juratory Caution.*—Where a complainer cannot consign, or find ordinary sufficient caution, he may offer a disposition and assignation of his whole means and estate in place of ordinary caution, and as he is required to depone on oath regarding the extent of the same, this substitute for ordinary caution is termed juratory caution.[1] Juratory caution may be offered either in the original Note, or the complainer may be allowed to amend the original Note to the effect of offering juratory caution. *See* Amendment of Note, &c., *supra*, p. 23.

In case of a Note of Suspension being presented on juratory caution, the Lord Ordinary shall, when he appoints the Note to be answered, name a commissioner to take the complainer's disposition; and the complainer shall intimate to the opposite party, or his agent, to attend at the time and place fixed by the commissioner in order that they may have an opportunity of cross-interrogating him, if they see fit, whether he have any lands in property or liferent, or bonds, bills, or contracts containing sums of money; and, in case he acknowledge the same, he shall condescend thereon, and depone that he has no other lands, bonds, bills, or contracts containing sums of money belonging to him; and the complainer shall also lodge with the Clerk of the Bills, 1st, the bond of caution; 2nd, a full inventory of his subjects and effects of every kind; 3rd, an enactment subjoined to the inventory, bearing that he will not dilapidate any of his property, and that he will not dispose of the same, or uplift any of the debts due to him, without consent of the respondent or his agent, or the authority of the judge (under pain of imprisonment, or being otherwise punished as being guilty of fraud) till the suspension be discussed, and until there be an opportunity of doing diligence for any expenses that may ultimately be found due by him; and further, the complainer shall lodge in the hands of the said clerk the vouchers of any debts due to him, and the title deeds of any heritable subjects belonging to him, so far as the same be in his possession or within his power; and the complainer also shall grant a special disposition to the respondent (if so required) of any heritable subjects he may be possessed of, and an assignation of all debts or other rights due to him, for the respondent's further security; the said disposition and assignation to be made out at the expense of

[1] Stair iv. 52, 26.

the respondent, and by his agent, and the same with the said vouchers and title deeds, if so deposited, to remain in the hands of the said clerk, subject to the directions of the Court, till the suspension be discussed; and until all such lodgment shall be made it shall not be necessary for the opposite party to give in his answers.[1]

This procedure must be gone through within fourteen days of the date of the interlocutor ordering the same, as in ordinary caution, and the *inducice* for answers do not begin to run until the deposition, with the requisite documents, have been lodged.[2]

Although it is necessary for the complainer to satisfy the Court that there is a *probabilis causa litigandi*[3] or that the circumstances are such that injustice will be done if the Note is not passed on juratory caution,[4] the answers should be directed towards the refusal of the Note, not only upon its merits, but also in respect that juratory caution is insufficient and inappropriate in the circumstances.

Instead of refusing on this latter plea a Note offering only juratory caution, however, the Lord Ordinary may allow the complainer to amend his Note to the effect of offering full caution. *See* Amendment of Note, &c., *supra*, p. 23.

(14) *Consignation.*—Except in a few cases in which consignation is required by statute or custom, consignation is an alternative to caution and may be said to lie entirely in the option of the suspender, as the Lord Ordinary on the Bills does not in practice order consignation where ordinary caution is offered.

It is in the interest of the suspender to make consignation, if possible, for whereas in ordinary caution, the caution must be found not only for the sum charged for, but for expenses,[5] in consignation the practice now is only to demand consignation of the sum charged for. Accordingly, the agent for a successful respondent was formerly not entitled as agent-disburser to obtain payment of his expenses from the sum consigned by the suspender in respect that the sum so consigned did not include the expenses of process,[6] but this is now remedied, and a law

[1] C.A.S., E. II. 13; A.S., 11th July, 1828, sec. 3.

[2] A.S., 11th July, 1828, sec. 12.

[3] *Marshall* v *Grant*, 1860, 22 D. 926; *M'Gregor* v *Lord Strathallan*, 1862, 24 D. 1006; *Logan* v *Weir*, 1870, 8 M. 1009; *Sinclair* v *Macmillan*, 1892, 30 S.L.R. 55; *Anderson* v *Somerville, Murray, & Co.*, 1898, 1 F. 90.

[4] *Livingstone* v *Beattie*, 1890, 17 R. 702.

[5] C.A.S., E. II. 7; A.S., 23rd November, 1613.

[6] *Peddie* v *Davidson*, 1856, 18 D. 1306.

agent can obtain a charging order upon the sum recovered or preserved by him on behalf of his client.[1] *See* Maclaren on Expenses, p. 269.

In all other respects, consignation operates in the same way as caution, and the same procedure is observed as is provided by the 4th section of the Act 1 & 2 Vict. cap. 86, for suspensions without caution or on juratory caution.[2]

Consignation may be made in money to the Clerk of the Bills, who must forthwith lodge the same with the Accountant of Court, whose receipt therefor is a discharge to the Clerk.[3] The Accountant within ten days after its receipt must lodge the same on deposit receipt in one of the Banks in Scotland established by Act of Parliament or Royal Charter.[4] Consignation may also be made by the suspender, or any party, lodging money on deposit receipt to the extent required, and every deposit receipt for money lodged in any of the said banks representing a consignation, whether lodged by the Accountant or by any party to a cause, or by any other person, shall be taken in name of the Accountant and his successors in office, and shall bear on the face of it the name of the party or parties by whom or on whose behalf the consignation is made, and of the cause, or proceeding, or bond to which it relates.[5]

When a final decree, either in favour of the complainer or of the respondent, has been pronounced, care must be taken to have included in the decree a warrant for uplifting the sum consigned, otherwise the successful party must himself bear the expense of a separate application.[6]

In the following cases consignation is necessary as a condition of passing the Note:—Suspensions of charges at the instance of ministers, universities, and colleges, for the rents of their benefices, stipends, and college rents, against heritors or possessors due and liable in payment thereof;[7] suspensions of charges against ministers, &c., in respect of the annual rates of the Ministers' Widows Fund;[8] and suspensions of charges on bank notes, &c.[9]

[1] Law Agents and Notaries Public (Scotland) Act, 1891 (54 & 55 Vict. cap. 30), sec. 6.

[2] C.A.S., E. II. 26; A.S. (Bill Chamber), 24th December, 1838, sec. 3.

[3] Court of Session Consignations (Scotland) Act, 1895 (58 & 59 Vict. cap. 19), sec. 3. See *Antrobus, Petitioner*, 1896, 23 R. 1032.

[4] 58 & 59 Vict. cap. 19, sec. 5.

[5] *Ibid.*

[6] *Field* v *Watt's Trustees*, 1865, 3 M. 609.

[7] 1669, cap. 7 (Record Edition), cap. 6 (12mo. Edition); 1695, cap. 51 (Record Edition), cap. 27 (12mo. Edition); 1696, cap. 14 (both editions).

[8] 19 Geo. III. cap. 20, secs. 55 & 56.

[9] 5 Geo. III. cap. 49, sec. 5.

In suspensions of charges for poor rates, there is sometimes imposed as a condition of passing the Note that the rate must first be paid,[1] but there is no fixed rule that the full sum must first be paid.[2]

Where a bond to a bank provided that suspension should only be passed on consignation, it was held competent to pass a suspension on caution merely.[3]

(15) *Procedure where no Appearance entered and no Answers.*—Where no appearance is made or answers lodged for the respondent, the complainer should present a Note setting forth the facts and craving the Lord Ordinary to pass the Note and to grant or continue the sist of execution or *interim* interdict, as the case may be.

As there is no decree in absence or by default in the Bill Chamber, the Lord Ordinary must consider the Note of Suspension before passing it,[4] and in practice the Lord Ordinary invariably passes the Note in such circumstances.

Until the year 1907, it was requisite, in order to have the Note finally disposed of in such circumstances, to transmit the process, after the lapse of fourteen days, to the office of the Outer House Judge to whom it was marked; but now "where a Note of "Suspension, Interdict, Suspension and Interdict, or Suspension "and Liberation, has been lodged in the Bill Chamber, and no "appearance has been entered, and no answers have been lodged, "and the Note has been passed with or without a sist, or with or "without *interim* interdict or liberation, it shall not be necessary "to mark the Cause to a Division or Outer House Judge, or to "transmit the process to an Outer House Clerk; but the Lord "Ordinary on the Bills shall have power immediately on passing "the Note to pronounce a final judgment in whole or in part "granting the prayer of the Note, suspending the charge, sisting "execution, or declaring the interdict to be perpetual, or the "*interim* liberation to be final; and the Lord Ordinary shall "have power to award expenses against the respondent and to "decern for the taxed amount thereof in the same manner as if "the case had been transmitted to an Outer House Judge accord-"ing to the present practice, and such interlocutor and process

[1] *Watson* v *Adams*, 1849, 11 D. 1263.
[2] *Glasgow, Paisley, and Ayr Railway Co.* v *Parochial Board of Abbey Parish of Paisley*, 1850, 13 D. 304.
[3] *Gilmour* v *Finnie*, 1831, 9 S. 907.
[4] *Arthur* v *Deuchar*, 1866, 4 M. 705.

"may be transmitted to the office of the Extractor of the Court "of Session and there dealt with in the same way as if it were "an interlocutor and process in the Court of Session."[1]

(16) *Procedure where Note defended.*

(*a*) *Entering Appearance.*—There is no rule in the Bill Chamber similar to that in the Court of Session with regard to entering appearance. The only rule which is enforced is that before the respondent's agent can borrow the process, he must first sign his name in the Roll of Suspensions, kept in the Bill Chamber. This he does on the left margin opposite the entry therein referring to the suspension, and immediately under the name of the complainer's agent.

(*b*) *Answers.*—Where a respondent intends to oppose the prayer of a Note of Suspension, he is required to lodge answers in a form similar to the reasons of suspension,[2] to intimate to the complainer that the same are in the hands of the clerk, and to lodge with the clerk a certificate of such intimation.[3] Where intimation has been omitted, the interlocutor of the Lord Ordinary advising the Note has been recalled by the Inner House.[4]

The running of the *inducicæ legales* for answers depends on two considerations. *In the first place,* if the first interlocutor is "to see and answer within eight "days and to be intimated," &c., without caution being required, the eight days do not commence to run until intimation has been made to the respondent of the Note of Suspension along with the first interlocutor.[5] *In the second place,* if the first interlocutor is "to see "and answer within eight days and to be intimated; "meantime on caution (or consignation) sists ex- "ecution (or grants interim interdict)," the eight days do not begin to run until caution has been given or consignation made.[6]

(*c*) *Hearing on Note and Answers.*—When answers have

[1] A.S., 20th March, 1907, sec. 15; C.A.S., E. II. 25.

[2] 1 & 2 Vict. cap. 86, sec. 6.

[3] C.A.S., E. II. 17; A.S., 14th June, 1799, sec. 4.

[4] *Craig* v *Wardrop*, 1824, 2 S. 636 (N.E. 539); *M'Kenzie* v *Rose*, 1827, 5 S. 916 (N.E. 851); *Linton* v *Aytoun*, 1831, 9 S. 683.

[5] C.A.S., E. II. 6; A.S., 11th July, 1828, sec. 12.

[6] *Ibid.*

been lodged, a hearing on the Note and answers may be desired by either party, and for this purpose a formal Note craving such a hearing is lodged in process, and a copy of the same sent to the other side; and a certificate of such intimation is endorsed on the back of the formal Note. A time for hearing is then arranged to suit parties, and the case is put out in the Bill Chamber Roll for hearing in Court, if in session, or in chambers, if in vacation. Although neither of the parties desires a hearing, the Lord Ordinary may himself order a hearing.

(*d*) *Amendment of Note.*—Besides amendment of the offer of caution (see *supra*, p. 23), the instance[1] and the prayer[2] of the Note have been allowed to be amended, and the practice now is to allow amendments in the same manner as in actions in the Court of Session.

(*e*) *Expenses.*—It is competent for the Lord Ordinary on the Bills to award expenses and to decide all questions relating thereto in processes of suspension, interdict, suspension and interdict, or suspension and liberation depending in the Bill Chamber, to the same effect as if such actions had been transmitted to the Court of Session.[3] *See* Maclaren on Expenses, p. 320, *et seq.*

(*f*) *Note Passed on Caution or Consignation.*—Where caution is to be found after the passing of the Note, the interlocutor does not take effect until caution has been found.[4] Accordingly if caution is not found the cause remains in the Bill Chamber,[5] and the respondent proceeds in the cause, first, by obtaining a certificate of no caution, and, second, by obtaining a finding for expenses and afterwards a decree therefor. See *supra*, pp. 27 and 28.

(*g*) *Interlocutor Passing or Refusing the Note.*—Where the Lord Ordinary passes the Note, it is not the practice for the interlocutor to contain the grounds of judg-

[1] *Edinburgh and Perth Railway Co.* v *North British Railway Co.*, 1846, 9 D. 307.

[2] *Caledonian Railway Co.* v *Buchanan*, 1855, 17 D. 996. See also *Insurance Committee for Burgh of Glasgow* v *Scottish Insurance Commissioners*, 1915, 1 S.L.T. 217.

[3] C.A.S., E. II. 23; A.S., 20th March, 1907, sec. 13.

[4] C.A.S., E. II. 21; A.S., 24th December, 1838, sec. 8.

[5] *M'Allister* v *M'Clelland*, 1866, 38 Jur. 399.

ment.[1] Where, however, the Lord Ordinary refuses the Note, it is in conformity with the general practice that the ground of refusal should be stated.[2] Where this has not been done, and a second Note is presented, the Lord Ordinary may, in his interlocutor on the second Note, explain his reason for refusal of the first Note.[3]

The Lord Ordinary on the Bills may pass Notes of Suspension in part, if he shall so deem proper, and refuse them as to the remainder.[4]

(*h*) *Forms of Interlocutor Passing the Note.*—As the general rule is that a Note of Suspension can only be passed on caution or consignation,[5] unless specially dispensed with, care is required so that the interlocutor passing the Note correctly represents the intention of the Lord Ordinary with respect to caution.

Thus, where caution or consignation has been ordered by the first interlocutor, and has been found, and the Lord Ordinary is of opinion that the caution or consignation should be continued, the interlocutor may be "Passes the Note." If, on the other hand, the Lord Ordinary thinks that the Note should be passed without caution, it is thought that the interlocutor should read "Passes the Note without caution."

Where, however, the first interlocutor has contained no order for caution, and the Note is intended to be passed on the same terms, it is thought that the interlocutor should run "Passes the Note without caution." The omission of the words "without caution" would mean that caution must be found, as caution must be found on the passing of the Note unless dispensed with. Where the question of caution is specially reserved by the first interlocutor, and the Lord Ordinary desires caution to be found on passing the Note, it is thought that the interlocutor should run—"Passes the Note on caution." If the Lord Ordinary is of opinion that caution is

[1] *M'Gregor* v *Lord Strathallan*, 1862, 24 D. 1006, per L.J.C Inglis.
[2] *Allan* v *Wilkie*, 1854, 16 D. 917, per L.P. M'Neill, pp. 918-9.
[3] *Ibid.*
[4] C.A.S., E. II. 18; A.S., 20th November, 1711, sec. 1.
[5] *Gilbertson* v *Ballantine*, 1851, 13 D. 995; Ersk. Inst. iv. 3. 19; Beveridge on the Bill Chamber, p. 30, sec. 136.

not necessary, it is thought that the interlocutor is "Passes the Note without caution."

It is understood, however, that the present practice of the Bill Chamber is to the opposite effect, and that where no mention of caution is made, caution is not required.

Where the Lord Ordinary on the Bills is in doubt regarding passing the Note, he may report the case to the Inner House, in which case "the interlocutor pro-" nounced thereon shall be considered as a judgment "by the Inner House, and be signed by the Lord "President of the Division accordingly."[1]

(*i*) *Effect of Interlocutor Refusing or Passing the Note.*—Where the Lord Ordinary refuses the Note, or passes the Note without caution, or, on caution and caution is found, he does not thereby become *functus*, as it is still in his power (1) to allow the complainer previous to the issue of a certificate of refusal to make a reference to respondent's oath;[2] or (2) to prohibit the delivery of the certificate of the passing or of the refusal of the Note.[3] A Note for any of these purposes may be presented by the party concerned.

(*j*) *Extracts.*—As the Extractor of the Court of Session is not an official of the Bill Chamber but only of the Court of Session, extracts of interlocutor pronounced in the Bill Chamber are made and issued by the Clerk of the Bills and not by the Extractor,[4] except in the case of a final judgment granted in virtue of A.S., 20th March, 1907, sec. 15.[5] Extracts in the Bill Chamber are usually called Certificates, except in the case of an interlocutor granting expenses, in which case a decree is issued.

(*k*) *Certificates.*—See *Extracts, supra.* (*j*)

(*l*) *Issuing Certificates of Passing or Refusal of the Note.*—When the Lord Ordinary on the Bills passes

[1] C.A.S., D. I. 6; A.S., 11th June, 1828, sec. 76; *Tod* v *North British Railway Co.*, 1846, 8 D. 726.; *cf. M'Connachie, Petr.*, 1914, S.C. 853.

[2] *Macdonald* v *Cooper*, 1848, 10 D. 740.

[3] C.A.S., E. II. 29; A.S., 24th December, 1838, sec. 5; *Macdonald* v *Cooper*, 1848, 10 D. 740, per L. Jeffrey, p. 744.

[4] *Morison* v *M'Kirdy*, 1842, 4 D. 563 at 564; *Clippens Oil Co., Ltd.* v *Edinburgh and District Water Trustees*, 1906, 8 F. 731, per L. Dunedin, p. 749; A.S., 15th July, 1842, sec. 4.

[5] C.A.S., E. II. 25.

a Note without caution, or upon caution and caution has been found, or where he refuses the Note, no formal extract of the interlocutor is given out. Instead there is given out a certificate of the passing or of refusal of the Note, as the case may be. These are not given out immediately. On the contrary, "in all Notes of Suspension, when refused, the certi- "ficate of refusal shall not be issued till 48 hours "after the entry of the refusal in the Minute Book; "and if the Notes are passed, the interlocutor shall "not take effect until 48 hours after such interlocutor "has been entered in the Minute Book, except as a "continuance of the sist or interdict where the inter- "dict has been continued, and where Notes of Sus- "pension and liberation are passed, they may be "carried into effect as heretofore." [1]

Where the Note has been refused it is not advisable to do diligence until a certificate of refusal has been obtained. [2]

(*m*) *Prohibition of the Issue of Certificates of Passing, or Refusal of the Note.*—The issue of a certificate of passing or of refusal of the Note may be prohibited on a Note presented by the party concerned. It is only granted on special cause shown, and the interlocutor granting prohibition may contain such terms, and conditions as may seem reasonable to the Lord Ordinary for enabling the party to obtain a review of the interlocutor or passing or refusing the Note.[3] It cannot, however, prorogate the time for lodging a reclaiming note.[4]

(*n*) *Reference to Oath.*—A reference to oath in a suspension is as competent in the Bill Chamber as in the Court of Session.[5] Thus, it may be made (*a*) in the suspension as presented;[6] (*b*) in a minute after the Note has been refused but before the certificate of refusal has been issued;[7] or (*c*) after such a certificate has been issued but the question of expenses is

[1] C.A.S., E. II. 21; A.S. (Bill Chamber), 24th December, 1838, sec. 8.
[2] *Wilson* v *Thomson*, 1824, 2 S. 762 (N.E. 633).
[3] C.A.S., E. II. 29; A.S. (Bill Chamber), 24th December, 1838, sec. 5; *Edwards* v *Begbie*, 1847, 9 D. 1384.
[4] *Fyffe* v *Fraser*, 1832, 10 S. 381.
[5] *Brown* v *Ferguson*, 1852, 14 D. 841.
[6] *Macdonald* v *Cooper*, 1848, 10 D. 740.
[7] *Ibid.*

still undisposed of.[1] It may also be made in a second suspension.[2]

Where made in a suspension as presented caution is not usually required.[3] Where, however, the Note is passed on oath the case proceeds in the usual way, and caution must be found unless dispensed with.[4]

If the reference is not proceeded with the respondent may, on presentation of a Note, get the Note refused.[5] The suspender may be allowed on cause shown to withdraw his reference to oath.[6]

(*o*) *Turning the Charge into a Libel.*—This was a method adopted for saving expense where, on discussing preliminary pleas, it was found that although the charger had a good ground of action against the suspender, the decree which the former had obtained against the latter was defective in form.[7] It is now in disuse.

(*p*) *Falling Asleep.*—When proceedings in a Note of Suspension have lain over for more than a year and a day, the same shall be held as asleep. It is competent for either party to revive the proceedings by a written Note to the Lord Ordinary on the Bills, duly intimated to the opposite party or his known agent fifteen days at least previous to laying the Note before the Lord Ordinary, the execution or certificate of intimation being produced along with the Note.[8]

(*q*) *Report to the Inner House.*—In case of difficulty as to procedure the Lord Ordinary on the Bills may report the same verbally to the Division to which the cause belongs, who may direct him how to proceed, or report to the other Division, if they see cause.[9]

When an application is made to the Lord Ordinary on the Bills, which arises out of an action depending before the Court of Session, it shall be competent for him, if he see cause, to report to the Division or the Lord Ordinary before whom the action is depending, and to order the Note, answers,

[1] *Brown* v *Ferguson*, 1852, 14 D. 841.
[2] *Aitcheson* v *M'Donald*, 1823, 2 S. 329 (N.E. 290); *Allan* v *Wilkie*, 1854, 16 D. 917.
[3] *Larkin* v *Smith*, 1823, 2 S. 114 (N.E. 105).
[4] *Gilbertson* v *Ballantine*, 1851, 13 D. 995.
[5] *Law* v *Thomson*, 1853, 15 D. 481.
[6] *Chalmers* v *Jackson*, 18th February, 1813, F.C. See also *Galbraith* v *M'Neill*, 1828, 7 S. 63; *Jameson* v *Wilson*, 1853, 15 D. 414.
[7] Ersk. Inst. iv. 3. 22.
[8] A.S., 8th July, 1831, sec. 5.
[9] A.S., 11th July, 1828, sec. 119.

and productions, if any, to be printed for the use of such Division or Lord Ordinary.[1]

"Where a case is taken to report to the Inner "House by the Lord Ordinary on the Bills, the inter- "locutor pronounced thereon shall be considered as a "judgment of the Inner House, and be signed by the "Lord President of the Division accordingly."[2] In a recent case this section of the Codifying Act of Sederunt was not followed, and a petition to the Lord Ordinary on the Bills for the arrestment of a ship, reported to the First Division, was by the Division remitted to the Lord Ordinary to pronounce a certain interlocutor, which he did in his own name.[3] No reason was given for this departure from the Act of Sederunt.

(17) *Reclaiming Note.*

(*a*) *Generally.*—Parties dissatisfied with the interlocutor of any Lord Ordinary on a Note, advised either during the sitting of the Court or in vacation, shall lodge a reclaiming note to the Court against the same; provided always, that all reclaiming notes shall be intimated to the agent of the opposite party and Clerk of the Bills, and in time of session be duly marked and boxed within fourteen days from the date of the interlocutor reclaimed against; and in vacation or recess, that the same shall be intimated to the opposite agent and the Clerk of the Bills within the said fourteen days, and duly marked and boxed on the first box-day, and if no box-day intervenes, on the first sederunt day thereafter.[4]

Notwithstanding that proceedings before the Lord Ordinary on the Bills are in manuscript, a reclaiming note must be printed as in ordinary reclaiming notes and appeals.

Marking must be by the Clerk of Process. It is not sufficient to have the reclaiming note marked by the Bill Chamber Clerk[5] or the Boxing Clerk.[6]

The reclaimer may mark the reclaiming note to

[1] C.A.S., E. II. 24.

[2] C.A.S., D. I. 6; A.S., 11th July, 1828, sec. 76; *Tod* v *North British Railway Co.*, 1846, 8 D. 726, at pp. 743-4.

[3] *M'Connachie, Petr.*, 1914, S.C. 853.

[4] C.A.S., E. II. 29; A.S. (Bill Chamber), 24th December, 1838, sec. 5; *Hopkirk* v *Mochrie*, 1859, 21 D. 835.

[5] *Plock* v *Wallace*, 1841, 4 D. 34.

[6] *MacKay* v *M'Culloch*, 1867, 5 M. 401.

any division he chooses, notwithstanding the original marking, which only takes effect after the Note is finally passed.[1]

The date of presenting the Note should be printed,[2] and "Bill Chamber" must be printed on the first page of the Note.[3]

Where the Note of Suspension and answers have not been boxed along with the reclaiming note, the reclaimer has been allowed to box the same upon payment of a small fine.[4]

It is not competent to prorogate the days of reclaiming.[5]

(*b*) *Its Effect.*—Such reclaiming notes shall neither prevent the Clerk of the Bills from issuing the passed Note or a certificate of refusal, as the case may be, nor hinder the interlocutor submitted to review from being carried into effect by the opposite party, unless the Lord Ordinary on the Bills shall stay proceedings, on special cause shown by a Note for the party, by prohibiting the delivery of the Note or the issuing of the certificate on such terms and conditions, and during such time, as he may judge reasonable, for enabling the party to obtain a review of the interlocutor.[6] In a recent case a stay of proceedings was not asked for from the Lord Ordinary on Bills but from the Division, and was granted until the reclaiming Note was heard.[7] In another recent case, the Clerk of the Bills was of opinion that a reclaiming note prevented the issue of a certificate of no caution.[8]

(*c*) *Appendix.*—When a reclaiming note is lodged against any interlocutor in the Bill Chamber, passing or refusing a Note of Suspension, or against an interlocutor remitting with instructions, there shall be appended to the note, in the former case, a copy of the Note of Suspension, with the statement of facts and note-of-pleas in law, and of the answers thereto;

[1] *Graham* v *North British Bank*, 1849, 11. D. 1165.
[2] *Earl of Morton* v *Anderson*, 1846, 8 D. 1249.
[3] A. & B. 1859, 21 D. 203.,
[4] *Robertson* v *Levack & Grieve*, 1828, 6 S. 824.
[5] *Fyffe* v *Fraser*, 1832, 10 S. 381.
[6] C.A.S., E. II. 29; A.S. (Bill Chamber), 24th December, 1838, sec. 5.
[7] *Board of Agriculture* v *Glendinning*, 3rd February, 1915, 2nd Division.
[8] *Scott* v *Davidson*, 1913, per Lord Hunter—not reported.

and in the latter case, and in all suspensions of final judgments of inferior judges, a copy of the Note of Suspension, with the statement of facts or reasons and note-of-pleas in law and answers thereto, and also of the summons and defences or record (if any) in the inferior Court.[1]

(*d*) *Reclaiming against Interlocutor Awarding Expenses in respect of a Certificate of no Caution.*—A reclaiming note in such a case is incompetent as the Note is out of Court. The only method of review is by a second Note of Suspension.[2]

(*e*) *Reclaiming against Interlocutor Refusing Note in respect of Failure to Proceed with a Reference to Oath.*—Although a second Note of Suspension may be the more correct method of review, a reclaiming note is also competent.[3]

(*f*) *Reclaiming against an Interlocutor becoming Final through Inadvertence or Mistake.*—It has been held that section 16 of 48 Geo. III. cap. 151 is applicable to the Bill Chamber.[4] Accordingly, where the reclaiming days against an interlocutor of the Lord Ordinary on the Bills have expired from inadvertence or mistake, it is competent, with the leave of the Lord Ordinary, to submit the said interlocutor to the Inner House by reclaiming note in order to be reponed.[5] The leave of the Lord Ordinary is essential,[6] and if he refuse leave, in respect that there has been no mistake or inadvertence, the Inner House will not usually interfere.[7] Payment of the opponents' expenses is a condition of being reponed,[8] even though by a previous interlocutor no expenses are found due.[9] The expenses, however, are only those in the Bill Chamber.[10] If the party reponed ultimately succeeds on the merits, he is entitled to repetition of the expenses paid in order to be reponed.[11] Doubt, however, has been thrown on this decision.[12]

[1] C.A.S., E. II. 30; A.S. (Bill Chamber), 24th December, 1838, sec. 6.
[2] *Purdie* v *Bryson*, 1861, 24 D. 85.
[3] *Law* v *Thomson*, 1852, 15 D. 481.
[4] *Arnot* v *Thomson*, 1826, 4 S. 427 (N.E. 432).
[5] *Bennet* v *Pyper*, 1833, 11 S. 414.
[6] *Mills* v *Hamilton*, 1829, 7 S. 716.
[7] *Babington* v *Newall*, 1841, 3 D. 611.
[8] *M'Ra* v *Birtwhistle's Trustees*, 1831, 9 S. 582; *Bennet* v *Pyper*, 1833, 11 S. 414.
[9] *Thom, Petr.*, 2nd May, 1811, F.C. (vol. 16, p. 250).
[10] *Arnot* v *Thomson*, 1826, 4 S. 427 (N.E. 432).
[11] *Brumby* v *Ogle*, 1822, 2 S. 15 (N.E. 12).
[12] *Stewart* v *Lang*, 1828, 6 S. 488 (note).

(*g*) *Judgment of Inner House.*—The Inner House in reviewing an interlocutor of the Lord Ordinary on the Bills sits as a Court of Review in the Bill Chamber. The proceedings are not in the Court of Session until the Note is passed. Accordingly,

First.—Where a reclaiming note complains of an interlocutor refusing a Note of Suspension in the Bill Chamber, and the Inner House intends to alter, it recalls the interlocutor reclaimed against, but does not pass the Note. A remit is made to the Lord Ordinary to pass it;[1]

Second.—If the reclaiming note complains of a judgment passing a Note, and the Inner House intends to alter, it does so, and remits to the Lord Ordinary to refuse the Note, with or without expenses, as the Inner House shall direct;[2] and

Third.—Where the Note has been refused in the Bill Chamber with expenses, and the Inner House intends to adhere with expenses, the Lords refuse the reclaiming note, find additional expenses due, and remit to the Lord Ordinary to modify and decern for the same. The proceedings are then transmitted to the Bill Chamber where the account is given in, taxed, and decerned for.[3] *See* Maclaren on Expenses, p. 320 *et seq.*

(18) *Appeal to the House of Lords.*—An appeal to the House of Lords is competent against a judgment pronounced by the Inner House of either Division upon review of the interlocutor of a Lord Ordinary on the Bills, or upon report of a case from the Bill Chamber.[4]

(19) *Second Note of Suspension.*—A second Note of Suspension is competent in cases other than where the first Note has been refused for want of caution. See *Caution, Second Note of Suspension*, p. 29. Thus a second Note of Suspension is competent where there has been a change of circumstances.[5] The Court has held the following to be changes of circumstances —Where a second Note for the first time makes a reference to

[1] 6 Geo. IV. cap. 120, sec. 46; *Morison* v *M'Kirdy*, 1842, 4 D. 563.
[2] *Morison* v *M'Kirdy*, 1842, 4 D. 563.
[3] *Ibid.*
[4] Beveridge on the Bill Chamber, p. 119, sec. 560; *Fleming* v *Dunlop*, 1839, M'L. & Rob. 547.
[5] *Allan* v *Wilkie*, 1854, 16 D. 917.

oath;[1] where there is a further putting into execution of the same diligence, as by poinding[2] or imprisonment,[3] thus converting a simple suspension into a suspension and interdict or a suspension and liberation respectively; where there are new and continued acts apparently *ejusdem generis* down to the time of the presentation of the second Note.[4]

A second Note was allowed in one case where the first Note had been passed on condition that the first Note was dropped.[5]

Where there is a change of circumstances it is not absolutely necessary that the payment of expenses of the first Note should be made a condition of presenting the second Note.[6]

A third Note of Suspension may be allowed provided there is a change of circumstances.[7]

(20.) *Procedure after Note passed.*

(*a*) *Transmission of Process to Court of Session.*—When a Note of Suspension has been passed by the Lord Ordinary on the Bills, such Note along with the answers, if lodged, and productions, shall be transmitted from the Bill Chamber to the office of the Clerk of the Process in the Outer House, at any time after the interlocutor passing the Note shall have taken effect, that the party or his agent taking the lead in the process may require, but, unless of consent, not until the days for reclaiming against such interlocutor shall have expired.[8]

(*b*) *Fixing of Lord Ordinary and Division of Court.*—It is the privilege of the respondent, at the time of the presentation of the Note, ordering its dependence in the Bill Chamber, to fix the Lord Ordinary and division of the Court to which the process shall be transmitted whenever it became an action in the Court of Session.[9] This, however, does not affect the right of a reclaimer to mark a reclaiming note from an interlocutor of the Lord Ordinary on the Bills.[10]

[1] *Aitcheson* v *M'Donald*, 1823, 2 S. 329 (N.E. 290); *Allan* v *Wilkie*, 1854, 16 D. 917.

[2] *Stewart* v *Ferguson*, 1841, 3 D. 668.

[3] *Haig* v *Service*, 1832, 11 S. 145; *Barr* v *Wotherspoon*, 1850, 13 D. 305.

[4] *M'Kenzie* v *Johnstone*, 1831, 10 S. 24.

[5] *Taylor* v *Glasgow, Paisley, and Ardrossan Canal Co.*, 1852, 15 D. 14.

[6] *M'Kenzie* v *Johnstone*, 1831, 10 S. 24; *Allan* v *Wilkie*, 1854, 16 D. 917.

[7] *Stewart* v *Ferguson*, 1841, 3 D. 668.

[8] C.A.S., E. II. 28; A.S. (Bill Chamber), 24th December, 1838, sec. 13.

[9] Court of Session Act, 1868, sec. 90.

[10] *Graham* v *North British Bank*, 1849, 11 D. 1165.

The respondent has also the privilege of fixing the Lord Ordinary and division as soon as the Note is passed and at any time not later than the twelfth day from the date of the interlocutor passing the Note, unless where such Note has been passed on review by, or on advising with, either division of the Court, in which case the process shall be fixed throughout with that division of the Court.[1] If the Note has not been fixed as aforesaid, the complainer may, as soon as the interlocutor passing the Note has become final, fix the Lord Ordinary and division of the Court.[2]

In practice the party in right of marking the Note may do so at any time during the running of the reclaiming days.

The name of the Lord Ordinary and the division is written on the original Note by the agent, with his signature and the date.

(*c*) *Calling.*—It is no longer necessary that the cause should appear in the Outer House calling list.[3]

(*d*) *Enrolling.*—As soon as the interlocutor passing the Note has become final, and caution has been found or consignation has been made, in the event of caution or consignation having been ordered, the cause becomes for all purposes an action depending in the Court of Session, and may immediately be enrolled by either party in the Motion Roll of the Lord Ordinary to whom it is marked.[4]

(*e*) *Interim Regulation.*—After a cause which has been initiated in the Bill Chamber has been transmitted to the Outer House, it shall be competent for the Lord Ordinary before whom the cause may be depending to pronounce an order granting or recalling *interim* interdict, or for *interim* regulation of the matters in dispute, at any stage of the cause, in the same manner and to the same effect and subject to the like review as is competent to the Lord Ordinary on the Bills.[5]

[1] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), sec. 33.
[2] Court of Session Act, 1868, sec. 90.
[3] Court of Session Act, 1868, sec. 90.
[4] Court of Session Act, 1868, sec. 90.
[5] C.A.S., C. II. 11; A.S., 20th March, 1907, sec. 16.

In a suspension of a charge proceeding on a promissory note the Lord Ordinary on the Bills granted *interim* sist of execution without caution. On the action being transmitted to a judge of the Outer House, the Lord Ordinary appointed the complainer to find caution, and, on his failure to do so, recalled the *interim* sist of execution.[1]

The Division of the Inner House, before which a cause which has been initiated in the Bill Chamber may for the time depend, may pronounce an order granting or recalling *interim* interdict, or for *interim* regulation of the matters in dispute, at any stage of the cause.[2] In a recent case,[3] this power was exercised in a reclaiming Note from an interlocutor pronounced in the Bill Chamber. It is thought that this power does not relate to such a case but only to a case where a reclaiming Note is presented to the Inner House after the Note has been passed into the Court ot Session. In the former case the proper procedure would seem to be by application to the Lord Ordinary on the Bills to stay execution.

(*f*) *Printing.*—Notwithstanding that a Note of Suspension has become for all purposes an action depending in the Court of Session,[4] section 26 of the Court of Session Act, 1868, regarding printing the record does not apply to such a case.[5] Accordingly, if the complainer fails to print, the respondent should enrol and obtain an order upon the complainer to print, which he must do within eight days from the date of such order.[6]

The date of the presentation of the Note should always be printed.[7]

(*g*) *Adjustment of and Closing the Record.*—After prints are lodged, the cause is put out in the Adjustment Roll, and adjusted and closed in the usual manner,

[1] *M'Allister* v *M'Gallagley*, 1910, 2 S.L.T. 163.
[2] C.A.S., D. I. 7; A.S., 20th March, 1907, sec. 16.
[3] *Board of Agriculture* v *Glendinning*, 3rd February, 1915, 2nd Division.
[4] Court of Session Act, 1868, sec. 90.
[5] *Meik* v *Thomson & Co.*, 1903, 5 F. 853.
[6] *Ibid.*, per Lord Pearson, Ordinary, at p. 854.
[7] *Earl of Morton* v *Anderson*, 1846, 8 D. 1249.

and the subsequent procedure is similar to that in an ordinary case.

(*h*) *Final Interlocutors in Court of Session.*—Formerly all final interlocutors required to be pronounced in the Court of Session. It is now provided, however, that where no appearance has been entered and no answers have been lodged in the Bill Chamber, and the Note has been passed with or without a sist, or with or without *interim* interdict or liberation, the Lord Ordinary on the Bills shall have power immediately on passing the Note to pronounce a final judgment in whole or in part granting the prayer of the Note, suspending the charge, sisting execution, or declaring the interdict to be perpetual, or the *interim* liberation to be final.[1]

Where the judgment of the Court of Session upon the passed Note is that the charge should be suspended, the interlocutor is:—"Sustains the reasons "of suspension, suspends the letters and charge "*simpliciter*, and decerns." If the respondent is successful the interlocutor runs:—"Repels the reasons "of suspension, finds the letters orderly proceeded, "refuses the prayer of the Note, and decerns." Where the complainer is only partially successful the interlocutor may be:—"Sustains the reasons of "suspension *quoad*——and to that extent suspends "the letters and charge; repels the reasons of sus- "pension *quoad*——and to that extent finds the "letters orderly proceeded, and refuses the prayer of "the Note; and decerns."[2]

Where letters have been orderly proceeded, execution may proceed on the old charge.[3]

[1] C.A.S., E. II. 25; A.S., 20th March, 1907, sec. 15.

[2] *Haughhead Coal Co.* v *Gallocher*, 1903, 11 S.L.T. 156; *Hardie* v *Brown*, *Barker, & Bell*, 1907, 15 S.L.T. 539.

[3] *Clark* v *Monteith*, 1885, 12 R. 939.

CHAPTER III.

SUSPENSION AND INTERDICT.

I. Generally.—Although it is possible to have an action in the Court of Session with a conclusion for interdict alone,[1] and although it might appear as if it were competent to present a Note for interdict alone in the Bill Chamber,[2] such a proceeding in practice has never been heard of. It is always combined with suspension. Accordingly where interdict is sought in the Bill Chamber the form used is a Note of Suspension and Interdict.[3] It is an appropiate remedy in two classes of cases:—*First*, to stay diligence; and *Second*, to prevent the infringement of any right.

II. To Stay Diligence.—(1) *Generally.*—It has already been shown that where diligence has not proceeded beyond the stage of an expired charge, the appropriate remedy against its wrongful use is a Note of Simple Suspension. Where, however, the charge on a decree, or liquid document of debt, has been followed by a poinding and no sale has taken place, it becomes necessary to combine an interdict with the suspension of the charge in order to prevent a sale of the pointed effects.[4]

The latter rule does not seem to apply to diligence threatened or used in respect of non-payment of rates. In such cases, no matter at what stage diligence has arrived, or whether it has only been threatened, the appropriate remedy seems to be a Note of Suspension and Interdict.[5] Where, however, diligence is threatened or used for non-payment of Imperial taxation, the remedy seems to be by Note of Simple Suspension in the

[1] Scots Style Book, vol. v., pp. 107 and 111.

[2] A.S., 20th March, 1907, sec. 15; C.A.S., E. II. 25.

[3] 1 & 2 Vict. cap. 86, sec. 6.

[4] Beveridge on the Bill Chamber, p. 83, sec. 392.

[5] *Glasgow, Paisley, &c. Railway Co.* v *Parochial Board of the Abbey Parish of Paisley*, 1850, 13 D. 304; *Neill* v *Hamilton*, 1864, 2 M. 1081; *Love* v *Campbell*, 1867, 3 S.L.R. 214; *Steuart* v *Parochial Board of Keith*, 1869, 8 M. 26; *British Fisheries Society* v *Magistrates of Wick*, 1872, 10 M. 426.

ordinary form in the Bill Chamber, although on any such Note being passed the cause must be enrolled before the Lord Ordinary in Exchequer causes.[1]

Suspension and interdict is also an appropriate remedy in the case of sequestration by a landlord for rent where the averments are that the effects sequestrated are not legally and effectually sequestrated.[2] If, however, there is no such objection, and the only objection is that the landlord has sequestrated goods which belong not to his tenant but to a third party, the remedy of the latter consists in appearing in the sequestration proceedings and claiming his goods. If the Sheriff decide against him he has a right of appeal.[3]

The threatened use of inhibition and arrestment may be interdicted where malice and oppression can be instantly verified.[4]

(2) *Grounds of Suspension and Interdict.*—The grounds which warrant the presentation of a Note of Suspension and Interdict are:—*First*, those which warrant a simple suspension (see *supra*); and *Second*, any informality or irregularity in the execution of the poinding or the proceedings prior to the sale. Thus, where the execution does not specify the amount of the debt for which the poinding was used;[5] where the poinding is excessive;[6] where there has been delay in reporting the poinding to the Sheriff;[7] where there has been delay in asking for a warrant to sell;[8] where, in the warrant to sell, the day,[9] or the place,[10] of sale is not fixed; and where there has not been sufficient notice of the sale;[11] a Note of Suspension and Interdict will be competent.

The omission of unimportant details, such as the omission to leave a note of the appraised values with the debtor or custodier,[12] will not usually found a Note of Suspension and Interdict.

[1] 19 & 20 Vict. cap. 56, sec. 21; *Renfrew and Brown* v *Magistrates of Glasgow*, 1861, 23 D. 505; *Borthwick* v *Lord Advocate*, 1862, 1 M. 94.

[2] *Lindsay* v *Earl of Wemyss*, 1872, 10 M. 708, per L.P. Inglis, p. 710. See also *Taylor* v *MacKnight*, 1882, 9 R. 857.

[3] *M'Kechnie* v *Duke of Montrose*, 1853, 15 D. 623; *Lindsay* v *Earl of Wemyss*, 1872, 10 M. 708; *Hoare* v *MacKay*, 1905, 13 S.L.T. 588.

[4] *Beattie & Son* v *Pratt*, 1880, 7 R. 1171.

[5] *Sangster* v *Burness*, 1857, 20 D. 355.

[6] *M'Kinnon* v *Hamilton*, 1866, 4. M. 852. See also *Le Conte* v *Douglas & Richardson*, 1880, 8 R. 175.

[7] *Sampson* v *M'Cubbin*, 1822, 1 S. 407 (N.E. 381); *Lyle* v *Greig*, 1827, 5 S. 845 (N.E. 785); *Miller* v *Stewart*, 1835, 13 S. 483.

[8] *Henderson* v *Grant*, 1896, 23 R. 659.

[9] *Kewly* v *Andrew*, 1843, 5 D. 860.

[10] *M'Vicar* v *Kerr*, 1857, 19 D. 948. See also *M'Kinnon* v *Hamilton*, 1866, 4 M. 852.

[11] *M'Neill* v *M'Murchy*, 1841, 3 D. 554.

[12] *M'Knight* v *Green*, 1835, 13 S. 342.

III. To Prevent the Infringement of any Right.

(1) *When appropriate—(a) Generally.*—Interdict is an appropriate remedy where there is a summary and unwarrantable invasion of a person's rights. Accordingly, a Note of Suspension and Interdict is appropriate where there has been an encroachment on property or the possession of it, or on personal rights, and damage has resulted. The injury that has been done must, however, have been done deliberately and not as the result of imprudence or thoughtlessness,[1] and the damage must be appreciable.[2] It is not necessary that actual injury has been sustained; it is quite sufficient if there is a reasonable ground for the apprehension of injury.[3] It must not be a contingent injury, however, that may never arise.[4]

The person complaining must have a title to make the application.[5] An interest without title will not be sufficient.[6] The complainer need not be infeft in his heritable estate;[7] it is sufficient that he has been in possession for seven years.[8] A landlord may sue for interdict in respect of operations complained of by his tenant,[9] and a superior may present a Note when his feuar is injured.[10] Traders and ratepayers have a right to apply for interdict where their patrimonial interests are concerned.[11]

A foreigner may be interdicted from doing a wrong within Scotland, even though no arrestments have been used to found jurisdiction and personal service

[1] *Hay's Trustees* v *Young*, 1877, 4 R. 398.

[2] *Winans* v *Macrae*, 1885, 12 R. 1051. See also *Steuart* v *Stephen*, 1877, 4 R. 873.

[3] *Singer Manufacturing Company* v *Kimball & Morton*, 1873, 11 M. 267. See also *King* v *Hamilton*, 1844, 6 D. 399; *Hoyle* v *Shaws Water Company*, 1854, 17 D. 83.

[4] *Hood* v *Traill*, 1884, 12 R. 362.

[5] *M'Intosh* v *Fraser*, 2 S. 460 (N.E. 412); *Weir* v *Glenny*, 1834, 7 W. & S. 244, per Lord Chancellor, 268-9; *Brown* v *Kidston & Waters*, 1852, 24 Jur. 464.

[6] *Anstruther* v *East of Fife Railway Company*, 1852, 1 Macq. 98.

[7] *Cranston & Elliot, Limited* v *Dobson*, 1899, 2 F. 271; *Mackay* v *Mackay*, 1914, S.C. 200.

[8] *Colquhoun* v *Paton*, 1859, 21 D. 996, per Lord Cowan, 1001.

[9] *M'Ewen* v *Steedman & M'Alister*, 1912, S.C. 156, 1913, S.C. 761. See also *Steuart* v *Stephen*, 1877, 4 R. 873; *Harvie* v *Robertson*, 1903, 5 F. 338, per Lord Adam, 344, and Lord Kinnear, 346.

[10] *Marquis of Breadalbane* v *Campbell*, 1851, 13 D. 647.

[11] *D. & J. Nicol* v *Dundee Harbour Trustees*, 1914, S.C. 374 affd., 1914, 2 S.L.T. 418.

has not been made upon him.[1] A person with his domicile, or having property, in Scotland may be interdicted against the commission of a wrong abroad, as in the case of restraining the prosecution of actions in foreign courts.[2] Prorogation is a good ground of jurisdiction to pronounce an interdict.[3]

A Note may be presented when there is only participation in the wrong done to the complainer.[4]

The violation of a contract may be interdicted although there is a provision in it for liquidated damages and not by way of penalty.[5]

A minister may be interdicted from preaching in a church,[6] and an order and sentence of the General Assembly adversely affecting civil rights may be interdicted.[7]

It is competent to interdict the election of an official who has been appointed but has not been inducted into his office and has not taken the oath.[8]

A Note of Suspension and Interdict is appropriate to prevent a Clerk of Court lending a production except for purposes of the case;[9] to prevent the circulation of a memorial to counsel by one of the parties to a case depending before the Court;[10] and to prevent the holder of an office from being interfered with in the exercise of his office.[11]

The receiver of private letters may be interdicted from publishing them.[12]

Where a person is illegally in possession it is quite competent to interdict him from "taking possession

[1] *Toni Tyres, Ltd.* v *Palmer Tyres, Ltd.*, 1905, 7 F. 477. See also *Waygood* v *Bennie*, 1885, 12 R. 651.

[2] *Lindsay* v *Paterson*, 1840, 2 D. 1373; *Young* v *Barclay*, 1846, 8 D. 774; *Carron Iron Company* v *Maclaren*, 1855, 5 House of Lords, 416 at 436; *Dawson's Trustees* v *Macleans*, 1860, 22 D. 685; *Liqrs. of the Pacific Coast Mining Company, Limited* v *Walker*, 1886, 13 R. 816.

[3] *Gill* v *Cutler*, 1895, 23 R. 371.

[4] *Wilson* v *Shepherd*, 1913, S.C. 300.

[5] *Curtis* v *Sandison*, 1831, 10 S. 72.

[6] *Brown* v *M'Dougall*, 1901, 4 F. 297.

[7] *Clark* v *Stirling*, 1839, 1 D. 955; *Presbytery of Strathbogie*, 1839, 2 D. 258, 585, 1047, 1380.

[8] *Watson* v *Glasgow Police Commissioners*, 1832, 10 S. 481.

[9] *Connon* v *Ballinten*, 1853, 2 Stuart, 376.

[10] *Miller* v *Mitchell*, 1835, 13 S. 644.

[11] *Drysdale* v *Magistrates of Kirkaldy*, 1825, 4 S. 126 (N.E. 128); *Lawson* v *St. Andrews University*, 1898, 5 S.L.T. 269.

[12] *White* v *Dickson*, 1881, 8 R. 896.

"or attempting to take possession of, or in any way "interfering" with the property.[1]

Where a person who has been interdicted assumes a partner, it is not necessary to raise a new suspension and interdict.[2]

Although a respondent should by minute withdraw any intention expressed of doing anything inconsistent with the complainer's right, interdict will be granted if he does not withdraw any pleas asserting a right from the record.[3]

Some of a body of trustees have been interdicted from assuming new trustees in order to overpower the rest.[4] See also (3), (4), (5), (6) *infra*.

(*b*) *Pending an Action of Declarator.*—Suspension and interdict is sometimes used in order to secure the *status quo* pending a decision in a different form of action, in which case when the Note is passed it is immediately sisted until the decision in the other case.[5] Thus, a suspension and interdict is competent at the instance either of the pursuer[6] or of the defender[7] of an action of *declarator*. The mere fact, however, that a person raises an action of declarator does not entitle him to present a Note of Suspension and interdict to get his opponent interdicted from altering the *status quo*.[8] In order to obtain such an interdict the complainer will require to show a *prima facie* case, but it may be sufficient if he can show that the respondent's title is not clear enough to entitle him to do the act complained of pending the decision of the point at issue in an ordinary action.[9] Accordingly, interdict will be refused if there is no *prima facie* case,[10] although

[1] *Colquhoun* v *MacKenzie*, 1894, 22 R. 23. See also *Dickson* v *Dickie*, 1863, 1 M. 1157.

[2] *Dudgeon* v *Thomson & Co.*, 1876, 3 R. 604; *Harvie* v *Ross*, 1886, 14 R. 71. See also *Duke of Buccleuch* v *Brown & Co.*, 1873, 1 R. 85.

[3] *Macleod* v *Davidson*, 1886, 14 R. 92.

[4] *Reid* v *Maxwell*, 1852, 24 Jur. 210.

[5] *Clippens Oil Co., Ltd.* v *Edinburgh and District Water Trustees*, 1906, 8 F. 731, per L.P. Dunedin at p. 750. See, however, *Fraser's Trustees* v *Cran*, 1877, 4 R. 794.

[6] *Magistrates of Glasgow* v *Glasgow Commissioners of Police*, 1839, 1 D. 460; *Kirkpatrick* v *Murray*, 1856, 19 D. 91.

[7] *Earl of Morton* v *Anderson*, 1846, 8 D. 1249.

[8] *Drew* v *Leburn*, 1850, 12 D. 983.

[9] *Menzies* v *Duff*, 1827, 5 S, 884 (N.E. 821).

[10] *Hume* v *Magistrates of Edinburgh* 1856, 19 D. 50.

the Court, while refusing interdict, may arrange that the other side will not be prejudiced in the meantime.[1]

(*c*) *Pending an Action of Reduction.*—It is also competent to present a Note of Suspension and Interdict in order to obtain interdict pending an action of reduction,[2] but this will only be granted if it is impossible otherwise to conserve the right of the pursuer in the reduction should he succeed in the latter action.[3]

(*d*) *Pending Review by Suspension.*—It has been held to be quite competent to present a Note of Suspension and Interdict in order to obtain interdict against a person in right of a decree from proceeding thereunder pending a review of the decree by Suspension,[4]

(*e*) *Pending an Appeal to the House of Lords.*—Where an appeal is taken to the House of Lords, the service of the order of that House upon the respondent to answer the appeal stays execution of the decree appealed against where some process is necessary to enforce the decree.[5] Where, however, no process is required, as in the case of the refusal of an interdict, a Note of Suspension and Interdict is competent to preserve the *status quo* until the decision of the House of Lords has been given.[6]

The mere fact that an appeal has been taken to the House of Lords is not sufficient to make such a Note competent.[7] The complainer must show good cause, as that the disturbance of the *status quo* would have a permanently injurious effect upon himself were he to succeed in his appeal, and that matters could never be restored to their original state.[8] Accordingly, where it is merely the payment of a

[1] *Galbraith* v *Smith*, 1837, 15 S. 808; *Anderson* v *Earl of Morton*, 1846, 8 D. 1085.

[2] *Greig* v *M'Farlane*, 1832, 10 S. 382; *Affleck* v *Affleck*, 1862, 24 D. 291.

[3] *Wilson* v *Caledonian Railway Co.*, 1860, 22 D. 697; *Johnston* v *Dumfriesshire Road Trustees*, 1867, 5 M. 1127; *cf. Shanks' Executors* v *Aberdeen Railway Co.*, 1850, 12 D. 781.

[4] *Wilson* v *Gilbert*, 1863, 1 M. 663.

[5] Ersk. Inst., iv. 3, 2; *Finnie* v *G. & S.-W. Railway Co.*, 1856, 18 D. 325 per L.J.C. Hope, 327; *Edinburgh Northern Tramways Co.* v *Mann*, 1891, 19 R. 24.

[6] *Campbell* v *Edinburgh & Glasgow Railway Co.*, 1855, 17 D. 790, per L.P. M'Neill, p. 793.

[7] *Finnie* v *G. & S.-W. Railway Co.*, 1856, 18 D. 325, per L.J.C. Hope, 328.

[8] *Innes* v *Innes*, 1829, 7 S. 762.

sum of money that is sought to be interdicted,[1] or where the balance of advantage is against the suspender,[2] the Court will not entertain the Note.

In the same way, although it is competent to suspend diligence on a decree which has been appealed to the House of Lords and in which no order for service has been obtained, the Court must have a good reason for exercising their discretion in favour of the suspender.[3]

(2) *Where Incompetent.*—Suspension and Interdict cannot be resorted to when the state of possession cannot truly be alleged to have been inverted or innovated upon, or to be endangered, and when the actual rights of the contending parties permit of being made the subject of judicial determination, in the ordinary and accustomed form of action for the trial of competing rights and claims.[4]

It is not competent to interdict a person formally elected to, and holding, an office,[5] nor to decide which of two claimants to an office should be preferred.[6]

It is incompetent to interdict a usage of long standing, although the usage is not founded on statute;[7] an injury which is contingent and may never arise;[8] a servitude enjoyed for seven years;[9] the publication of a report of proceedings in the Law Courts;[10] or a postmaster who is obeying the orders of his superior officer.[11]

It is incompetent in a Suspension and Interdict to try a supposed failure of duty of directors where the failure of duty has resulted in a decree of Court against the directors.[12]

It is incompetent to interdict the extracting of a final decree[13] or the recording of an inhibition.[14]

[1] *Finnie* v *G. & S.-W. Railway Co.*, 1856, 18 D. 325.

[2] *Campbell* v *Edinburgh & Glasgow Railway Co.*, 1855, 17 D. 790.

[3] *Glasgow & Londonderry Steam Packet Co.* v *Clyde Shipping Co.*, 1859, 22 D. 2. See also *Henderson, Petitioners*, 28th January, 1802, Mor. *voce* Appeal; Appendix No. 1.

[4] Lord Cowan in *Borrows* v *Colquhoun*, 1852, 24 Jur. 443, approved by L.C. Cranworth, 1854, 1 Macq., 691 at p. 694; *Lidgerwood* v *Lanarkshire & Dumbartonshire Railway Co.*, 1903, 11 S.L.T. 55; *Sibbald* v *Magistrates of Dundee*, 1907, 14 S.L.T. 734.

[5] *Orr* v *Vallance*, 1831, 10 S. 93; *cf. Gilmour* v *Craig*, 1852, 24 Jur. 261.

[6] *Fleming* v *Dunlop*, 1839, Maclean & Robinson, 547.

[7] *Mylne* v *Horne*, 1850, 12 D. 883.

[8] *Hood* v *Traill*, 1884, 12 R. 362.

[9] *Porterfield* v *M'Millan*, 1847, 9 D. 1424.

[10] *Riddell* v *Clydesdale Horse Society*, 1885, 12 R. 976.

[11] *Horne* v *Macgregor*, 1908, 15 S.L.T. 961.

[12] *Graham* v *North British Bank*, 1849, 11 D. 1165.

[13] *Goodsir* v *Chalmers' Trustees*, 1821, 1 S. 15 (N.E. 12).

[14] *Craig* v *Anderson*, 6th July, 1776, 5 Brown's Supp. 482.

It is incompetent to interdict the sale of a person's goods on the averment of a creditor, who has not constituted his claim, that the seller intends to defeat the creditor's right[1] and go abroad.[2]

It is incompetent to present a Note of Suspension and Interdict where a criminal prosecution would stop the wrong complained of.[3]

It is incompetent to interdict proceedings under a statute for a public work within the powers of the Act which provided only the remedy of indemnification for any loss sustained. [4]

In a recent case where interdict was asked against a Sheriff registering the result of a poll to ascertain whether the Burghs' Gas Supply (Scotland) Act, 1876, should be adopted, the Court held the Note to be incompetent against the Sheriff who was fulfilling a ministerial duty enjoined by Act of Parliament.[5] See also (5) *infra.*

(3) *Where Complainer's Title Doubtful.*—Where the complainer's title is not clear, it is usual for the Court to insist that an interdict should be preceded by an action of declarator,[6] especially where the respondent is admittedly in possession,[7] or has some rights which are indeterminate.[8] In some cases, however, questions involving the title of the complainer have been allowed to be tried in a Suspension and Interdict without the necessity of a preliminary action of declarator.[9]

It is quite competent to interdict an assessing authority from attempting to recover assessments based upon an entry in the Valuation Roll which the complainer avers is wrong, provided the interdict is prefaced by an action of declarator.[10]

(4) *Equitable Jurisdiction.*—Although the complainer may be legally entitled to the interdict he seeks, the Court has an equitable jurisdiction which in exceptional cases it will exercise so

[1] *Commercial Bank* v *Gilchrist*, 1831, 9 S. 646.

[2] *Morton* v *Morton*, 1849, 11 D. 859.

[3] *Institute of Patent Agents* v *Lockwood*, 1894, 21 R. (H.L.) 61.

[4] *Lord Douglas* v *Dundee & Newtyle Railway Co.*, 1827, 6 S. 329.

[5] *Cowdenbeath Gas Co., Ltd.* v *Keir and Another*, 1915, 1 S.L.T. 112. The report sets forth that the Note was withdrawn but the interlocutor bears out the statement in the text.

[6] *Magistrates of Lanark* v *Wylie*, 1852, 14 D. 876; *Cruickshank* v *Irving*, 1854, 17 D. 286; *Green* v *Shepherd*, 1866, 4 M. 1028, per L.J.C. Inglis at p. 1029.

[7] *Lord Lovat* v *Fraser*, 1845, 8 D. 316; *Grierson* v *School Board of Sandsting and Aithsting*, 1882, 9 R. 437.

[8] *Scott* v *M'Dowall*, 1857, 19 D. 769.

[9] *Earl of Fife* v *Magistrates of Banff*, 1829, 8 S. 137; *Ministers of Edinburgh* v *Magistrates of Edinburgh*, 1838, 16 S. 400; *Colquhoun* v *Paton*, 1853, 16 D. 206; *Thurlow* v *Tait*, 1893, 1 S.L.T. 62.

[10] *Sharp* v *Latheron Parochial Board*, 1883, 10 R. 1163; *Abercromby* v *Badenoch*, 1909, 47 S.L.R. 18.

as to withhold from the complainer the remedy to which in ordinary circumstances he would be entitled as a matter of course; but to justify the exercise of such an equitable power there must be some very cogent reason.[1]

It is, however, not a ground for refusing to enforce an established right by interdict that the granting of interdict will cause inconvenience or pecuniary loss to the person resisting the granting of the interdict out of all proportion to the loss which would result to the other party from refusing interdict.[2]

(5) *Note must be Timeous.*—Previous to the Court of Session Act, 1868, the ordinary rule was that where the Act complained of was nearly completed,[3] or completed[4] and acquiesced in,[5] at the date of the presentation of the Note, the Note was not considered to have been presented *tempestive*. Moreover, where *interim* interdict was refused at the presentation of the Note, and the act complained of was completed before the passing of the Note, the Court on a reclaiming note refused to grant *interim* interdict against a thing already done.[6]

By section 89 of the Court of Session Act, 1868, however, the former practice was to a certain extent relaxed. That section is as follows:—"Where a respondent in any application "or proceeding in the Bill Chamber, whether before or after the "institution of such proceeding or application, shall have done "any act which the Court in the exercise of its preventive "jurisdiction might have prohibited by interdict, it shall be "lawful for the said Court, or for the Lord Ordinary on the "Bills, upon a prayer to that effect, in the Note of Suspension "and Interdict, or in a supplementary note, to ordain such "respondent to perform any act which may be necessary for "re-instating the complainer in his possessory right, or for "granting specific relief against the illegal Act complained of."

The view has been expressed that it is still necessary to have

[1] *Macnair* v *Cathcart*, 1802, Mor. 12832; *Sanderson* v *Geddes*, 1874, 1 R. 1198; *Begg* v *Jack*, 1874, 1 R. 366, 1875, 3 R. 35; *Grahame* v *Magistrates of Kirkcaldy*, 1882, 7 A.C. 547; *Place* v *West Highland Railway Co.*, 1895, 2 S.L.T. 487; *cf. Clippens Oil Co., Ltd.* v *Edinburgh and District Water Trustees*, 1897, 25 R. 370.

[2] *Bank of Scotland* v *Stewart*, 1891, 18 R. 957.

[3] *Lowson's Trustees* v *Crammond*, 1864, 3 M. 53.

[4] *Dick* v *Thom*, 1829, 8 S. 232; *Presbytery of Dunoon* v *Campbell*, 1844, 6 D. 1262; *Blackburn* v *Finlay*, 1848, 10 D. 590; *Blackburn* v *Buchanan*, 1848, 20 Jur. 199.

[5] *Hoyle* v *Shaws Water Co.*, 1854, 17 D. 83.

[6] *Glen* v *Caledonian Railway Co.*, 1868, 6 M. 797.

a good and competent interdict under the old rule before the enlarged powers of this section can be invoked.[1]

Since its passing it has been held that a Note is not timeous where the Act complained of has been completed before presentation of the Note,[2] or before being heard in the Inner House,[3] yet if there are other questions raised which may competently be considered in such a process, the Note will be passed notwithstanding that the principal act complained of has been completed.[4] In an important case where *interim* interdict was refused on presentation of the Note, and the Act complained of was completed *pendente lite*, the Court ordered the restoration of matters to their original state.[5]

It is too late to ask for interdict on the morning of a sale, when the complainer knew of the forthcoming sale for a considerable time previously.[6]

(6) *Arbitration.* — It is quite competent to interdict *ab ante* arbitration proceedings, but the tendency of judicial opinion is against such an interdict, and rather in favour of considering the question after it has been before the arbiter himself.[7]

Where arbitration proceedings have commenced, the Court as a general rule will not interdict proceedings unless it is perfectly clear that the arbiter has no such power as he is called upon to exercise,[8] or that the respondent's claim is clearly irrelevant.[9]

Interdict is not confined to cases of excess of jurisdiction, but is competent also where the arbiter fails to exercise his power.[10]

[1] *George Heriot's Trust* v *Carter*, 1902, 10 S.L.T. 514, per Lord Pearson.

[2] *Ibid.*

[3] *Caledonian Railway Co.* v *G. & S.-W. Railway Co.*, 1903, 11 S.L.T. 510.

[4] *Symington and Others* v *Wilsons and Union Tube Co., Ltd.*, 1904, 11 S.L.T. 589.

[5] *Clippens Oil Co., Ltd.* v *Edinburgh and District Water Trustees*, 1897, 25 R. 370. See also *Insurance Committee for Burgh of Glasgow* v *Scottish Insurance Commissioners*, 24th February, 1915, 1 S.L.T. 217.

[6] *Ayala* v *Dowell*, 1893, 1 S.L.T. 374.

[7] *G. & S.-W. Railway Co.* v *Caledonian Railway Co.*, 1871, 44 Jur. 29. *Christison's Trustee* v *Callender-Brodie*, 1906, 8 F. 928, per L.P. Dunedin, p. 931.

[8] *Dumbarton Water Commissioners* v *Lord Blantyre*, 1884, 12 R. 115; *Sinclair* v *Clyne's Trustee*, 1887, 15 R. 185; *Wemyss* v *Ardrossan Harbour Co.*, 1893, 20 R. 500, per Lord Kincairney, p. 503; *Caledonian Railway Co.* v *Morrison*, 1898, 25 R. 1001; *Licenses Insurance Corporation, Ltd.* v *W. & R. B. Shearer*, 1907, S.C. 10. See also *Pearson* v *Oswald*, 1859, 21 D. 419; *G. & S.-W. Railway Co.* v. *Caledonian Railway Co.*, 1871, 44 Jur. 29.

[9] *Glasgow, Yoker, and Clydebank Railway Co.* v *Lidgerwood*, 1895, 23 R. 195.

[10] *Birkmyre Brothers* v *Moore & Weinberg*, 1907, 14 S.L.T. 702. See also *Adams* v *Great North of Scotland Railway Co.*, 1890, 18 R. (H.L.) 1, per L.C. Halsbury 6, and Lord Watson 8.

IV. Procedure.

(1) *Form of Note of Suspension and Interdict.*

Unto the Right Honourable the Lords of Council and Session, Note of Suspension and Interdict for *A*, merchant in *B*, against *C*, merchant in *D*.

That the complainer is under the necessity of applying to your Lordships for suspension and interdict against the said respondent, as will appear to your Lordships from the annexed statement of facts and note of pleas in law.

That the complainer is willing to find caution, acted in your Lordships' books, for whatever damage or expense the said respondent may sustain, in case it shall be found by your Lordships that he is liable for the same (*or* to find juratory caution, complying with the requisites of the *Act of Sederunt*, which is all that the complainer in his present situation and circumstances is able to find—*or*, that the complainer considers that, in the whole circumstances of the case, he is entitled to have this Note passed, and interdict granted, without caution or consignation).

May it therefore please your Lordships to suspend the proceedings complained of, and to interdict, prohibit, and discharge the said respondent from (*here state the specific interdict wanted, and that not by reference to the statement of facts annexed to the Note*), or to do otherwise in the premises as to your Lordships shall seem proper.—According to Justice, &c.

(Signed by Agent.)

Although *interim* interdict may incidentally be granted on any Note,[1] it is not now the practice of the Bill Chamber to grant it unless it is specially asked for in the prayer.[2] It should, therefore, be included in the prayer, if desired.

Where a complainer desires reinstatement in his possessory right or specific relief against an illegal act, he can add a prayer to that effect.[3]

In cases of nuisance, where the nuisance has arisen from the manner in which an operation is carried out, and there is a possibility that a new method of carrying out the operation may be invented which would be innocuous, the prayer for interdict against the respondent carrying on operations should be limited

[1] *Kelso School Board* v *Hunter*, 1874, 2 R. 228, per Lord Deas at p. 232.

[2] Antonio's Bill Chamber Forms and Procedure, p. 64.

[3] Court of Session Act, 1868, sec. 89.

by such words as "in the manner hitherto practised by him, or "in any other manner whereby the complainer's property may "be injured."[1] A combined Note of Suspension and of Suspension and Interdict is a recognised form of process.[2]

In a Note of Suspension and Interdict to stay the sale of poinded effects, if the objection is to the warrant for the poinding, the warrant must be suspended as well as the subsequent diligence; but if it is only to the mode in which the poinding has been executed, only the objectionable proceedings need,[3] or can be suspended.[4]

(2) *Interdict must be Precise.*—The prayer of the Note must be precise and definite, so that the respondent may know at once when he is doing anything that can be construed into a breach of interdict.[5] No interdict should be asked for exactly in the terms of a statute unless it is perfectly clear that there can be no question about the meaning of its terms.[6]

A petition for breach of interdict can only be brought against those named in the interdict,[7] except the person against whom proceedings are taken has aided and abetted the person interdicted in his breach of interdict knowing that interdict was standing against him.[8]

Interdict may be asked for and granted against each of a set of respondents using certain kinds of nets which are calculated to capture, and do capture, salmon, without proof of the actual killing of salmon by the respondents individually or collectively.[9]

(3) *Statement of Facts.*—An articulate statement of the facts on which the Note of Suspension and Interdict is founded is annexed to the Note, together with a Note of Pleas in Law.[10] In the statement of facts the complainer must set forth a

[1] *Shotts Iron Co.* v *Inglis*, 1882, 9 R. (H.L.) 78. See also *Duke of Buccleuch* v *Brown & Co.*, 1873, 1 R. 85; *Fleming* v *Hislop*, 1886, 13 R. (H.L.) 43; *Seafield* v *Kemp*, 1899, 1 F. 402.

[2] *Hobbin* v *Burns*, 1904, 11 S.L.T. 681, per Lord Pearson, 682.

[3] Graham Stewart on Diligence, p. 758; *Shiell* v *Mossman*, 1871, 10 M. 58; *Samuel* v *Mackenzie & Bell*, 1876, 4. R. 187.

[4] Graham Stewart on Diligence, p. 758; *Clark* v *Hamilton & Lee*, 1875, 3 R. 166.

[5] *Cathcart* v *Sloss*, 1864, 3 M. 76, per L.P. Inglis, p. 77; *Middleton* v *Leslie*, 1892, 19 R. 801, per L.P. Robertson at p. 802; *Cairns* v *Lee*, 1892, 20 R. 16, per Lord Adam, p. 20; *Perth General Station Committee* v *Ross*, 1897, 24 R. (H.L.) 44, per Lord Morris, p. 54.

[6] *Brown* v *Thomson*, 1882, 9 R. 1183 per L.P. Inglis.

[7] *Pattison* v *Fitzgerald*, 1823, 2 S. 536 (N.E. 468).

[8] *Dudgeon* v *Thomson & Donaldson*, 1876, 3 R. 604 and 974; 4 R. (H.L.) 88; *Harvie* v *Ross*, 1886, 14 R. 71; *cf. Bankier Distillery Co.* v *Young's Collieries, Ltd.*, 1899, 2 F. 89.

[9] *Duke of Buccleuch* v *Smith*, 1911, S.C. 409.

[10] 1 and 2 Vict. cap. 86, sec. 6; *Wyllie* v *Brand*, 1836, 14 S. 553.

title and interest along with a legitimate and definite purpose. He must also set forth the diligence sought to be interdicted. and the wrong done or threatened. See *supra*, pp. 50-55.

(4) *Joint Complainers.*—If there is more than one complainer the parties must have a common interest. Thus, separate owners of fishings on a river may competently interdict persons doing injury to their rights as a whole, as by the erection of a dam dyke,[1] or by pollution,[2] or by netting,[3] but they cannot sue collectively against persons fishing on a particular part of a stream where the interest to interdict resides in only one proprietor and is not a common interest.[4]

In the same way a landlord and tenant may present a Suspension and Interdict in their joint names to interdict a person from trespassing on their estate.[5] See *supra*, p 51.

(5) *Respondent.*—It is always competent to interdict the actual wrongdoer, although if he is acting as agent for another both may be called as respondents.[6] In a case where the respondents were in the habit of ferrying members of the public across a river to a landing place belonging to them, and the passengers thereafter trespassed on the complainer's land, it was held that a Note of Suspension and Interdict directed against the respondents to interdict them from carrying across the said passengers was directed against the wrong parties, and that it should have been directed against the members of the public who trespassed.[7]

In a Note of Suspension and Interdict to stay the sale of poinded goods the respondent should be the poinder or landlord as the case may be, and, if presented on the eve of the sale, the auctioneer should be added as a respondent, or at all events the Note should be intimated to him.[8]

(6) *Sist of Respondent.*—It was held in a patent case that a third party claiming a patent had no right to be sisted as a respondent in an interdict by a party holding a similar patent

[1] *Lord Forbes and Others* v *Leys, Mason, & Co.*, 1824, 2 S. 603 (N.E. 515).

[2] *Duke of Buccleuch* v *Cowan & Sons*, 1864, 2 M. 653.

[3] *Duke of Buccleuch* v *Smith*, 1911, S.C. 409.

[4] *Arthur* v *Aird*, 1907, S.C. 1170.

[5] *Jolly* v *Brown*, 1828, 6 S. 872.

[6] *Dobbie* v *Halbert*, 1863, 1 M. 532, per L.J.C. Inglis, p. 534; *cf. Montgomerie & Co.* v *Young Bros.*, 1904, 11 S.L.T. 600, per Lord Young (servant acting contrary to orders).

[7] *Stirling Crawfurd* v *Clyde Navigation Trustees*, 1881, 8.R. 826.

[8] Graham Stewart on Diligence, p. 758.

against a party who did not appear[1]; but in a recent case where a company contracted with patentees to use their plant and processes, and allowed the latter to inspect their works to ascertain the amount of royalties, and thereafter entered into a similar contract with a rival firm, and the former patentees proceeded to carry out their inspection of the company's works, the latter patentees raised an action against the Company to interdict them from allowing the former patentees to inspect the company's works as it might disclose their secret processes, and the former patentees were allowed to sist themselves as defenders, although the company did not defend.[2]

A disclosed principal cannot demand to be sisted as a party to a process of interdict directed against his agent.[3]

(7) *Procedure on Presentation of Note.*—The Note, having been prepared in conformity with the foregoing instructions, is lodged with a full copy of the same[4] in the Bill Chamber, where it is received and marked by the Clerk of the Bills and forthwith laid before the Lord Ordinary on the Bills.[5] If there has been a *caveat* (see *supra*, p. 15) lodged, the Clerk of the Bills intimates the fact of the presentation of the Note to the respondent and arranges a hearing. If there is no *caveat*, the Lord Ordinary may either hear the agent for the complainer before dealing with the Note, or he may deal with it simply upon the averments contained in the Note itself with the productions.

The following are the several ways in which the Lord Ordinary may deal with the Note:—

First.—Where caution or consignation is not offered, or if the Note is manifestly incompetent, the Lord Ordinary may at once refuse the Note. This treatment of the Note, however, is unusual, and accordingly,

Second.—Where caution or consignation is not offered the Lord Ordinary will usually allow intimation in the following terms:—"To see and answer within —— days, and to be intimated."

Third.—Where ordinary caution or consignation is offered, and *interim* interdict is sought, and the Lord Ordinary is of

[1] *Laing's Sewing Machine Co.* v *Norrie & Sons*, 1877, 5 R. 29; *cf. Glasgow Shipowners' Association* v *Clyde Navigation Trustees*, 1885, 12 R. 695, per Lord Shand, 699. See also *Weir* v *Denny & Co.*, 1894, 1 S.L.T. 451.

[2] *Gas Power and By-Products Co., Ltd.* v *Power Gas Corporation, Ltd.*, 1911, S.C. 27.

[3] *Dobbie* v *Halbert*, 1863, 1 M. 532. See also *Bankier Distillery Co.* v *Young's Collieries*, 1899, 2 F. 89, where it was held that an interdict cannot be transferred against a singular successor of the wrong-doer.

[4] A.S. (Bill Chamber), 24th December, 1838, sec. 1.

[5] 1 & 2 Vict. cap. 86, sec. 6.

opinion that *interim* interdict should be granted, he pronounces the following interlocutor:—"To see an answer within —— days, "and to be intimated; meantime, on caution (*or* consignation) as "offered grants *interim* interdict;"[1] or, if he is of opinion that *interim* interdict should not be granted the following interlocutor is pronounced:—"To see and answer within —— days, "and to be intimated;" or, if he thinks the question of *interim* interdict should be reserved—"To see and answer within —— "days, and to be intimated, reserving as to *interim* interdict "until the cause is heard on answer."

Fourth.—Where the Note is presented on ordinary caution or consignation, but the complainer submits that in the circumstances of the case caution or consignation should be dispensed with, and *interim* interdict is sought, the Lord Ordinary may either

(*a*) Grant *interim* interdict without caution or consignation. "To see and answer within —— days, and to be "intimated; meantime grants *interim* interdict;" or

(*b*) Grant *interim* interdict on caution or consignation— "To see and answer within —— days, and to be "intimated; meantime, on caution (*or* consignation) "grants *interim* interdict;" or

(*c*) Grant *interim* interdict reserving as to caution or consignation—"To see and answer within —— days, and "to be intimated; reserving as to caution (*or* consig- "nation) until the Note is heard on answer;" or

(*d*) Reserve as to *interim* interdict—"To see and answer "within —— days, and to be intimated; reserving as "to *interim* interdict until the Note is heard on "answer;" or

(*e*) Refuse *interim* interdict—"To see and answer within "—— days, and to be intimated."

Fifth.—Where *interim* interdict is not asked, the interlocutor runs—"To see and answer within —— days, and to be "intimated."

Sixth.—When the Note is presented on juratory caution, and the Lord Ordinary grants *interim* interdict, he also names a Commissioner to take the complainer's deposition.[2]

(8) *Considerations Determining the Terms of the First*

[1] *Nisbet* v. *Gibson*, 1830, 3 Jur. 38; *Wilson* v. *Gilchrist*, 1900, 2 F. 391; A.S., 11th July, 1828, sec. 19.

[2] C.A.S., E. II. 13; A.S., 11th July, 1828, sec. 3; *Sinclair* v *MacMillan*, 1892, 30 S.L.R. 55.

Interlocutor.—The considerations which determine whether *interim* interdict should be granted or not at the presentation of the Note, and if granted, whether it should be granted *simpliciter* or on caution or consignation, are impossible to set forth in detail, but where there is any glaring defect in a poinding, or in any of the prior steps of diligence, or where the complainer has a clear title and the acts complained of are manifestly inconsistent with that title, or where the interests of the public, or the balance of convenience and inconvenience rests upon the complainer's case being upheld, *interim* interdict will be granted. In the same way, where immediate action is necessary to prevent irreparable injury being done, *interim* interdict will be granted without the necessity of finding caution. So much, however, depends on the circumstances of each individual case that it is impossible to give any definite rules. The undernoted cases may, however, be consulted with advantage.[1]

Where a Lord Ordinary does not think it proper on an *ex parte* statement to grant an *interim* interdict, as there may be reasons of which he is not aware against any interference, the consequences of which he cannot anticipate, he will likely reserve consideration of the question of *interim* interdict.[2]

If at the presentation of the Note the Lord Ordinary hears the complainer's agent upon the question of *interim* interdict, and it appears that the Lord Ordinary is not inclined to grant it, the proper course for the complainer's agent to pursue is not to press for *interim* interdict, as the Lord Ordinary might in such a case put in the interlocutor that *interim* interdict was refused, a fact that would prejudice him when he came to ask for *interim* interdict at the passing of the Note.

(9) *Effect of Interim Interdict.*—If *interim* interdict is granted *simpliciter*, its intimation to the respondent operates immediately as a stay of the proceedings complained of under pain of a petition and complaint.[3] If, however, *interim* interdict is granted on caution or consignation, the interdict does not become operative until caution is found or consignation is made.[4]

(10) *Duration of Interim Interdict.*—*Interim* interdict granted on presentation of a Note, either *simpliciter* or on

[1] *Walker* v *Christie*, 1849, 11 D. 373; *Baird* v *Monkland Iron Co.*, 1862, 24 D. 1418; *Wilson* v *Gilbert*, 1863, 1 M. 663; *Lindsay* v *Robertson*, 1867, 5 M. 864.

[2] *Balfour's Trustees* v *Edinburgh and Northern Railway Co.*, 1848, 10 D. 1240 at p. 1243 (note).

[3] *Robertson* v *M'Donald*, 1829, 7 S. 272; *Clark* v *Stirling*, 1839, 1 D. 955, per Lord MacKenzie.

[4] *Wilson* v *Gilchrist*, 1900, 2 F. 391.

caution or consignation found, subsists until it is recalled and does not fall with the lodging of answers.[1] Where granted on the passing of a Note, either *simpliciter* or on caution or consignation found, it subsists until the cause is finally disposed of.[2]

(11) *Intimation of Notes.* See *supra*, p. 14.

(12) *Service on the Respondent.* See *supra*, p. 14.

(13) *Execution of Service.* See *supra*, p. 14.

(14) *Caveat.* See *supra*, p. 15.

(15) *Caution.*—The procedure to obtain caution, the amendment of the Note as regards caution, the time within which caution must be found, &c., are the same as in a Simple Suspension, except that in the Bond of Caution the cautioner is taken bound not only for payment of damages and expenses for wrongous suspension but also for payment of damages for wrongous interdict. See *supra*, p. 19; *infra*, p. 71.

(16) *Juratory Caution.* See *supra*, p. 31.

(17) *Consignation.* See *supra*, p. 32.

(18) *Procedure where no Appearance entered and no Answers.* See *supra*, p. 34.

(19) *Procedure where Note defended.* See *supra*, p. 35.

(*a*) *Entering Appearance.* See *supra*, p. 35.

(*b*) *Answers.* See *supra*, p. 35.

(*c*) *Amendment of Note.* See *supra*, p. 36. In a recent case a Note was allowed to be amended so as to add a prayer in terms of section 89 of the Court of Session Act, 1868.[3]

(*d*) *Expenses.* See *supra*, p. 36.

(*e*) *Passing or Refusing the Note.*—The first question to be considered by the Lord Ordinary on the Bills is whether the Note should be passed or refused. In so doing the Lord Ordinary is confined to the averments and productions of the complainer as admitted or established, and possibly the statements of the respondent if instantly verifiable. If it appears on the face of the complainer's own statements that the Note is incompetent or irrelevant, it will be the duty of the Lord Ordinary to refuse the Note.[4] If, how-

[1] *Home Drummond* v *M'Lachlan*, 1908, S.C. 12; *cf. Dundee Gas Light Co.* v *Dundee New Gas Light Co.*, 1844, 7 D. 109; *Hamilton* v *Allan*, 1861, 23 D. 589, per L.J.C. Inglis at p. 591.

[2] *Clippens Oil Co., Ltd.* v *Edinburgh and District Water Trustees*, 1906, 8 F. 731, 1907, S.C. (H.L.) 9.

[3] *Insurance Committee for Burgh of Glasgow* v *Scottish Insurance Commissioners*, 24th February, 1915, 1 S.L.T. 217.

[4] *Sawers* v *Sawers' Trustees*, 1861, 24 D. 101.

ever, there is any doubt upon the point the usual course is to pass the Note in order that these questions may be more fully discussed. Sometimes the merits of the case emerge quite distinctly from the pleadings, as where the question is a pure question of law, in which case the Lord Ordinary will pass or refuse the Note according to his interpretation of the question raised.[1]

The parties may also agree by Minute to the disposal of the case as a passed Note, in which case the judgment pronounced will be final, and if the complainer succeeds he may bring the case into Court on the passed Note and obtain decree as a matter of course.[2]

(*f*) *Interim Interdict at Passing the Note.*

(i.) *Generally.*—Having made up his mind to pass the Note, the next question that the Lord Ordinary has to consider is the question of *interim* interdict. This is a most important question, for if granted it subsists until the final decision of the cause.[3] *Interim* interdict may have already been granted at the presentation of the Note, in which case, unless the Answers or Statement of Facts for the respondent contain averments instantly verifiable, or documents are produced by the respondent which contradict the complainer's statements, the *interim* interdict already granted will most likely be continued. If, however, the statements so made, or the documents produced by the respondent, are not denied, and put a different complexion on the case from the case stated by the complainer, the Lord Ordinary may recall the *interim* interdict already granted.[4]

Where *interim* interdict has not been granted at the presentation of the Note, either because it

[1] *Campbell* v *Edinburgh and Glasgow Railway Co.*, 1855, 17 D. 613. See also *Balfour's Trustees* v *Edinburgh and Northern Railway Co.*, 1848, 10 D. 1240, per L.J.C. Hope, p. 1245; *Mutter* v *Fyfe*, 1848, 11 D. 303.

[2] *Watson* v *Neuffert*, 1863, 1 M. 1110, per L.J.C. Inglis at p. 1114. See also *Balfour's Trustees* v *Edinburgh and Northern Railway Co.*, 1848, 10 D. 1240, per Lord Medwyn, p. 1250.

[3] *Clippens Oil Co., Ltd.* v *Edinburgh and District Water Trustees*, 1906, 8 F. 731; 1907 S.C. (H.L.) 9.

[4] *Baird* v *Kerr*, 1877, 14 S.L.R. 434.

was not pressed for or was reserved until the hearing on answer, the Lord Ordinary will approach the subject with an open mind. Where *interim* interdict has, however, been deliberately refused at the presentation of the Note, it will be difficult for the complainer to obtain *interim* interdict at the passing of the Note, unless he is able to produce additional documents or make additional statements which the respondent cannot refute.

"Whether the *interim* interdict should be "granted must depend on the special nature of the "interest and pleas maintained in each particular "case—whether, for instance, the act complained "of is about to be done on a man's own property, "or on that of his neighbour, in the exercise of "some supposed faculty—on the grounds on which "the complaint is rested, or on which a complaint "apparently well founded is proposed to be ellided "and overcome—on the state of possession and the "nature of the authority on which each party "founds their alleged title, and also in very many "cases by a consideration of the effect that an "*interim* interdict would have on the interests "and situations of the parties respectively, as "these would severally be effected by the ultimate "judgment, especially by a judgment in favour of "the party against whom the *interim* interdict is "asked."[1]

(ii.) *The Basis of the Decision.*—The decision as to *interim* interdict is usually arrived at solely on the averments of parties supported by documents or facts established or admitted,[2] but sometimes in cases of nuisance where the answers contain averments that the nuisance has now abated in consequence of remedial measures taken by the respondent, the Court, before finally granting or refusing *interim* interdict, may remit to a man of skill to report.[3]

[1] *Magistrates of Edinburgh* v *Edinburgh, Leith, and Granton Railway Co.*, 1847, 19 Jur. 421, per L.J.C. Hope, p. 426.

[2] *Lindsay* v *Robertson*, 1867, 5 M. 864, per L.J.C. Patton at p. 866.

[3] *Baird* v *Monkland Iron & Steel Co.*, 1862, 24 D. 1418; *Duke of Buccleuch* v *Brown & Co.*, 1873, 1 R. 85.

Where the answers to the Note are unsatisfactory this may be a good reason for granting, or continuing, *interim* interdict.[1]

(iii.) *Prima Facie Case in Averment.*—The mere fact that a *prima facie* case in averment is made out is no reason why *interim* interdict should be granted.[2] "There are cases where the *admitted* facts are "sufficient to justify the granting of *interim* inter- "dict; and in some cases there may be material "averments which admit of instant verification, but "mere relevancy of averment is not sufficient."[3]

Where it was established that a respondent had recently polluted a stream, that in itself was held to be a *prima facie* ground for granting interdict.[4]

(iv.) *The Effect of Possession.*—"If a settled state of "possession is sought to be disturbed—a possession "not precarious, nor sudden, nor recent, nor having "its origin in violence—the law will incline towards "the continuance of such possession as against the "pretensions of parties seeking to disturb it;"[5] and, indeed, where "a possession, though tortious "in the assumption, has been open and peaceable, "and no objection taken for some time, it is not a "sort of possession to be disturbed, unless the want "of all right is so very plain that there can be no "doubt of it."[6]

A tenant whose lease was reduced but who was still in possession was held entitled to interdict a party from shooting over the lands let to him.[7]

(v.) *Inversion of Proper Use.*—Where a road[8] or a

[1] *Incandescent Gas Light Co., Ltd.* v *M'Culloch*, 1897, 5 S.L.T. 180.

[2] *Rankin* v *M'Lachlan*, 1864, 3 M. 128, per L.J.C. Inglis at p. 133.

[3] *Ibid.*

[4] *Seafield* v *Kemp*, 1899, 1 F. 402, per Lord Kyllachy (Ordinary), pp. 410-11.

[5] *L.J.C. Patton in Lindsay* v *Robertson*, 1867, 5 M. 864, at p. 866. See also Lord Cowan, *ibid.*, at p. 867; *Clark* v *Irvine Academy*, 1830, 9 S. 97; *Campbell* v *Edinburgh and Glasgow Railway Co.*, 1859, 21 D. 265, per L.P. M'Neill at p. 272; *Baird* v *Monkland Iron and Steel Co.*, 1862, 24 D. 1418, per Lord Cowan, p. 1427; *Mercer* v *Esk Valley Railway Co.*, 1867, 5 M. 1024, per L.P. Inglis, p. 1028.

[6] *Lord Glenlee in Fife Ferry Trustees* v *Magistrates of Dysart*, 1827, 6 S. 265. See also *Murray's Trustees* v *Mowatt*, 1835, 14 S. 84.

[7] *Innes* v *Partridge*, 1826, 4 S. 761 (N.E. 769). See also *Innes* v *Allardyce*, 1822, 2 S. 93 (N.E. 85).

[8] *Mercer* v *Esk Valley Railway Co.*, 1867, 5 M. 1024, per L.P. Inglis at p. 1028.

building[1] is let for a specific purpose, and its proper use is inverted, or attempted to be inverted, interdict against the improper use has been granted.

(vi.) *Interest of Parties.*—Where it would be extremely injurious to the interests of the complainer, if ultimately successful, to allow the proceedings complained of to go on, *interim* interdict will be granted, especially if the interests of the respondent would not be prejudiced, in the event of his succeeding, to an extent which would bear comparison with such a loss as the complainer would sustain.[2] If, however, the injury to the respondent by granting the interdict would be greatly in excess of the injury done to the complainer by the refusal of *interim* interdict, the Court will refuse the interdict.[3]

(vii.) *Where Irreparable Injury will Result.*—"If there "is irreparable injury to be sustained by either "recalling or keeping on the interdict, that is a "very important consideration. If there is irrepar- "able injury on *both* sides, and as the necessary "consequence of either proceeding, it raises a very "difficult question indeed. Still it will be a balance "of convenience and injury. Upon which side is "the balance? Where is the greater injury to be "apprehended? But if on the one side you see an "unquestionable irreparable injury, and on the "other you do not find anything in the materials "before you that has an appearance of an irrepar- "able injury, then I think there can be no doubt "upon which side the balance should turn."[4]

(viii.) *Interests of the Public.*—Where an undertaking is being proceeded with for the benefit of the public

[1] *Leechman* v *Sievwright*, 1826, 4 S. 683 (N.E. 690); *Baillie* v *MacKay*, 1842, 4 D. 1520; *Duke of Argyll* v *M'Arthur*, 1861, 23 D. 1236.

[2] *Lindsay* v *Robertson*, 1867, 5 M. 864, per L.J.C. Patton, p. 866; *Wilson* v *G. & S.-W. Railway Co.*, 1850, 13 D. 227, per Lord Cockburn, p. 234.

[3] *Campbell* v *Edinburgh and Glasgow Railway Co.*, 1855, 17 D. 790; *Wilson* v *Gilbert*, 1863, 1 M. 663, per L.P. M'Neill at p. 664; *Tennant & Co.* v *Thomson*, 1870, 8 S.L.R. 15.

[4] *Baird* v *Monkland Iron and Steel Co.*, 1862, 24 D. 1418, per L.J.C. Inglis, p. 1425. See also *Innes* v *Innes*, 1829, 7 S. 762.

and is urgent, the Court will not interdict its progress, especially if the respondent finds caution for any damage which the complainer may instruct.[1] In the same way, where the respondent is doing, or threatening to do, something that may affect the safety of the public or public property, *interim* interdict will be granted."[2]

(ix.) *Refusal of Interim Interdict on Caution by Respondent.*—It frequently happens that to grant *interim* interdict would cause great inconvenience and loss to the respondent and to third parties, and that, although caution might be obtained from the complainer to meet the loss to the respondent caused by the complainer obtaining a wrongous interdict, this would not altogether meet the requirements of the case. Accordingly, in such cases, the Court refuses interdict upon the respondent finding caution for any damage which the complainer might instruct. This was done in a case where road trustees, for whom a contractor had been building a bridge, entered into possession, in terms of a decree arbitral, and proceeded to complete the building of the bridge.[3] It has also been done in cases where the complainer seeks to restrain the respondent from manufacturing articles which he avers infringes his patent, in which case the Court usually refuses interdict on the respondent finding caution[4] and undertaking to keep an accurate account of the goods in question manufactured, sold, or exported, the prices received, and the persons to whom they have been so sold or exported.[5]

In a Suspension and Interdict founded on a

[1] *Johnston* v *Dumfriesshire Road Trustees*, 1867, 5 M. 1127; *cf. Scott* v *Clyde Navigation Trustees*, 1871, 8 S.L.R. 656.

[2] *Glasgow Magistrates* v *Glasgow Commissioners of Police*, 1839, 1 D. 460; *Caledonian Railway Co.* v *Buchanan*, 1855, 17 D. 996.

[3] *Johnston* v *Dumfriesshire Road Trustees*, 1867, 5 M. 1127. See also *Anderson* v *Morris*, 1854, 26 Jur. 459.

[4] *Stirlings* v *Black*, 11th March, 1803, F.C.

[5] *Macnee* v *Black*, 1855, 17 D. 837. See also *Incandescent Gas Light Co., Ltd.* v *M'Culloch*, 1897, 5 S.L.T. 180, per Lord Pearson.

clause in a charter which the complainer stated conferred on him the right to certain fishings, the Court did not grant *interim* interdict, but passed the Note *simpliciter* and ordained an account to be kept by the respondents of the fish caught by them pending the disposal of the question.[1] In a case where *interim* interdict was asked on caution, and where the complainer's right was not an action of damages in the proper sense of the term, but was a right to refuse passage unless on payment, the Court, while refusing *interim* interdict, insisted upon the respondent, without admitting liability, paying a wayleave to the complainer until the question was finally disposed of, under caution by the complainer to repeat if he should be ultimately unsuccessful.[2]

(x.) *Interim Interdict Granted on a Judicial Undertaking by the Complainer.*—In a case where the complainers had been in possession of mussel beds for more than fifty years, and the complaint against the respondents was that they were dredging for and taking away the mussels, the Court granted interdict on the judicial undertaking by the complainers that they would supply the respondents during the litigation at a stated rate per basket—a sum said, and not disputed, to be the lowest price ever charged.[3]

(*g*) *Caution at Passing the Note.*—The last question which the Lord Ordinary has to consider when he passes the Note is the question of caution. "The propriety "of caution for loss in the event of a judgment "ultimately in favour of the respondents, and the "effect of an interdict on the ultimate interests of "parties in the event of eventual success on the part "of the respondents, are always considerations of the

[1] *Earl of Fife* v *Magistrates of Banff*, 1829, 8 S. 137. See also *Monkland Canal Co.* v *Dixon*, 1822, 1 S. 412 (N.E. 385); *Carnegie* v *Brand*, 1826, 4 S. 802 (N.E. 809); *Ferguson* v *Sutherland*, 1866, 2 S.L.R. 38; *Bernard* v *Bernard*, 1893, 1 S.L.T. 29.

[2] *Graham* v *Duke of Hamilton*, 1868, 6 M. 965.

[3] *Lindsay* v *Robertson*, 1867, 5 M. 864, at pp. 866-7.

"utmost importance in the disposal of such applica-
"tions."[1]

Formerly where the note was passed, and *interim* interdict was granted on caution, the failure to find caution had the effect of refusing the Note, but of late a distinction has been made between passing the Note and granting *interim* interdict. Thus, in a recent case in the Bill Chamber (*unreported*) the Lord Ordinary, while of opinion that the Note should be passed and *interim* interdict granted on caution, was of opinion that if caution were not found the passing of the Note should not be affected, but only the granting of *interim* interdict.

It is a general rule that caution should be offered,[2] and in several cases *interim* interdict has been refused because no caution has been offered.[3] There is, however, no imperative rule to that effect,[4] and where it would be doing an injustice to the complainer,[5] or where it is quite clear that the act complained of is incompetent,[6] caution will not be insisted upon.

The considerations which determine the granting or refusal of caution are similar to those which determine the granting or refusal of *interim* interdict (*q.v.*).

(*h*) *Interlocutors Passing or Refusing the Note.*

Where *interim* interdict has already been granted on presentation *without caution*, the following are the several interlocutors which may be pronounced:—

"Passes the Note and continues *interim* interdict."

"Passes the Note and on caution continues *interim* "interdict."

[1] *Balfour's Trustees* v *Edinburgh & Northern Railway Co.*, 1848, 10 D. 1240, per L.J.C. Hope, p. 1245.

[2] Ersk. Inst. iv. 3, 19; A.S., 23rd Nov., 1613; A.S., 29th January, 1650; *Gilbertson* v *Ballantine*, 1851, 13 D. 995, Beveridge, p. 30, sec. 136.

[3] *Balfour's Trustees* v *Edinburgh & Northern Railway Co.*, 1848, 10 D. 1240, per Lord Murray, p. 1243 (note); *Primrose* v *Primrose*, 1852, 15 D. 31, per Lord Cuninghame, p. 34.

[4] *Balfour's Trustees* v *Edinburgh & Northern Railway Co.*, 1848, 10 D. 1240, per Lord Medwyn, p. 1250.

[5] *Livingstone* v *Beattie*, 1890, 17 R. 702, per L.P. Inglis, p. 703.

[6] *Balfour's Trustees* v *Edinburgh & Northern Railway Co.*, 1848, 10 D. 1240, per L.J.C. Hope, p. 1249, and Lord Medwyn, p. 1250.

"Passes the Note and recalls *interim* interdict."

"Passes the Note and on caution by the respondent "recalls *interim* interdict."

"On caution passes the Note and continues *interim* "interdict."

"On caution passes the Note and recalls *interim* "interdict."

"Refuses the Note and recalls *interim* interdict."

Where *interim* interdict has already been granted *on caution*—

"Passes the Note and continues *interim* interdict."

"Passes the Note and recalls *interim* interdict."

"On caution passes the Note and recalls *interim* "interdict."

"Passes the Note and on caution by the respondent "recalls *interim* interdict."

"Refuses the Note and recalls *interim* interdict."

Where *interim* interdict has *not* already been granted—

"Passes the Note."

"On caution passes the Note."

"Passes the Note and grants *interim* interdict."

"On caution passes the Note and grants *interim* "interdict."

"Passes the Note and on caution grants *interim* "interdict."

"Passes the Note and on caution by the respondent "refuses *interim* interdict."

"Refuses the Note."

(*i*) *Effect of Interlocutor Passing or Refusing the Note.* See *supra*, p. 38.

(*j*) *Extracts.* See *supra*, p. 38.

(*k*) *Certificates.* See *supra*, p. 38.

(*l*) *Issuing and Prohibiting Issue of Certificates.* See *supra*, pp. 38, 39.

(*m*) *Reference to Oath.* See *supra*, p. 39.

(*n*) *Reclaiming Note.* See Suspension, *supra*, p. 41.

(*o*) *Appeal to the House of Lords.* See *supra*, p. 44.

(*p*) *Second Note.* See *supra*, p. 44.

(*q*) *Procedure after Note passed.* See *supra*, p. 45.

(*r*) *Fixing Lord Ordinary and Division.*—In every Sus-

pension and Interdict, where interdict has been granted in the Bill Chamber and is unrecalled, the rule with regard to fixing the Lord Ordinary and Division is similar to that where a simple Suspension is concerned. *See supra*, p. 45. Where, however, the Note has been passed without *interim* interdict, the right of fixing the Lord Ordinary and Division is not in the respondent for twelve days from the date of the interlocutor passing the Note, but rests solely with the complainer.[1]

In practice the party in right of marking the Note may do so at any time during the running of the reclaiming days.

(*s*) *Supplementary Note to Re-instate or Grant Relief to the Complainer.*—A supplementary Note may be presented either to the Lord Ordinary on the Bills or to the Court for the purpose of re-instating a complainer in his possessory right, or for granting specific relief against the illegal act complained of in a Note of Suspension and Interdict, where the respondent has done any act which the Court in the exercise of its preventive jurisdiction might have prohibited by interdict.[2]

[1] *Bennet* v *Bruce*, 1894, 2 S.L.T. 340; *The Toni Tyres, Ltd.* v *The Palmer Tyres, Ltd.*, 1904, 12 S.L.T. 43.

[2] Court of Session Act, 1868, sec. 89. See *Clippens Oil Co., Ltd.* v *Edinburgh and District Water Trustees*, 1897, 25 R. 370 at p. 379.

CHAPTER IV.

SUSPENSION AND LIBERATION.

(1) *Generally.*—Where a person is imprisoned for failure to pay a civil debt, neither simple Suspension nor Suspension and Interdict will be sufficient to release him from prison; the only remedy is a Note of Suspension and Liberation.

The Debtors (Scotland) Act, 1880,[1] and The Civil Imprisonment (Scotland) Act, 1882,[2] have limited imprisonment for civil debt to cases where there has been a failure to pay (*a*) taxes and fines or penalties due to His Majesty; (*b*) rates and assessments lawfully imposed; (*c*) sums decerned for aliment, where failure to pay aliment is wilful;[3] or (*d*) to implement a decree *ad factum præstandum.*[4] Imprisonment may also follow upon a warrant granted against a person as being *in meditatione fugæ*, but in such a case the person so imprisoned must be attempting to evade a debt for which he would otherwise be liable to be imprisoned.[5]

(2) *Civil or Criminal.*—It is often difficult to determine whether a Suspension and Liberation should be raised in the High Court of Justiciary, in the Bill Chamber, or in the Court of Exchequer. If the person is imprisoned in respect of his failure to pay a fine, and the case is clearly a criminal case, the remedy is by a Bill of Suspension and Liberation in the High Court of Justiciary. If, however, imprisonment is only the compulsitor for the recovery of a fine in a civil process, the remedy is by a Note of Suspension and Liberation in the Bill

[1] 43 & 44 Vict. cap. 34.
[2] 45 & 46 Vict. cap. 42.
[3] *Glenday* v *Johnston*, 1905, 8 F. 24.
[4] *MacKenzie* v *Balerno Paper Mill Co.*, 1883, 10. R. 1147. See also *Bottger* v *Globe Furnishing Co.*, 1906, 14 S.L.T. 117; *Stewart* v *M'Dougall*, 1907, 14 S.L.T. 921; *Rudman* v *Jay*, 1908, S.C., 552.
[5] *Hart* v *Anderson's Trustees*, 1890, 18 R. 169; *Glenday* v *Johnston*, 1905, 8 F. 24. See also A B & C D, 1843, 5 D. 1116; *Marshall* v *Dobson*, 1844, 7 D. 232; *Kidd* v *Hyde*, 1882, 9 R. 803; *MacKay* v *Parish Council of Resolis*, 1899, 1 F. 521.

Chamber. As to what are criminal and what are civil processes see the subjoined cases.[1]

Although a simple Suspension directed against or by the Crown may be brought in the Bill Chamber,[2] it would seem that Suspension and Liberation for failure to pay taxes is incompetent in the Bill Chamber, and can only be presented in the Court of Exchequer.[3]

(3) *Grounds of Suspension and Liberation.*—Suspension and Liberation may be asked for on any ground that could be urged in a simple suspension, as where there is an irregularity in the execution of the charge.[4] It may also be asked in respect of any irregularity of the warrant of imprisonment, as where there is a failure to specify the place and date;[5] where the name of the person against whom it is directed is written on an erasure;[6] or where a larger sum is stated than is due.[7] Liberation may also be obtained where there is a valid objection to the manner in which and the extent to which the warrant to imprison has been carried into execution.[8]

In a small-debt action, a warrant for imprisonment may be granted after the lapse of 10 days without a charge, if the defender was personally present when decree was pronounced. If the defender was not present and the warrant for imprisonment has been put into execution without a charge, the warrant may be suspended and liberation granted.[9] In the same way where a petition for imprisonment obtained in the Ordinary Sheriff Court for an alimentary debt was not intimated to the respondent until his arrest, the proceedings were held to be illegal.[10]

In cases of imprisonment on a *meditatione fugæ* warrant the petition should set forth a specific sum of debt. If this is not done and the debtor is incarcerated, a Suspension and Liberation

[1] *Park* v *Earl of Stair*, 1852, John Shaw's Just. Rep. 532; *Stevenson* v *Scott*, 1854, 1 Irvine, 603; *Todd* v *M'Gowan*, 1905, 4 Adam, 544, per L.J.G. Dunedin, pp. 556-7. See also Trotter on the Summary Jurisdiction (Scotland) Act, 1908, p. 59.

[2] Exchequer Court (Scotland) Act, 1856, sec. 21.

[3] *Brough* v *Stewart*, 1850, 13 D. 408. See also *Roy* v *Young & Wilson*, 17th February, 1824, F.C.; *Pool* v *Magistrates of Annan, &c.*, 17th December, 1831, F.C.

[4] *Clark* v *Hamilton & Lee*, 1875, 3 R. 166.

[5] *Sim* v *Yuile*, 1845, 8 D. 8; *cf.* *Wilson* v *Wilson*, 1848, 11 D. 160.

[6] *Cowan* v *Watt*, 1829, 7 S. 553.

[7] *Wilson* v *Stronach*, 1862, 24 D. 271. See also *Watson* v *Gardner*, 1834, 12 S. 588; *Gibson* v *Anderson*, 1846, 9 D. 1.

[8] *Wilson* v *Stronach*, 1862, 24 D. 271, per L.J.C. Inglis at p. 275.

[9] *Shiell* v *Mossman*, 1871, 10 M. 58.

[10] *Cook* v *Wallace & Wilson*, 1889, 16 R. 565.

will be successful.[1] The petitioner may, however, set forth the particulars of debt by a minute lodged after the petitioner's oath has been taken.[2] The purpose of the intended flight need not be set forth in the petition;[3] it is sufficient if the creditor depones to the verity of the debt and his belief that the debtor meditates flight.[4] The oath of verity must be made by the party applying for the warrant, and where not so emitted, a Note of Suspension and Liberation was passed.[5] Where in the warrant for imprisonment the name and designation of the person to be imprisoned, the ground or duration of imprisonment, and the jail in which the imprisonment was to take place, were omitted, and reference was only made to a previous interlocutor, the debtor was liberated.[6] A warrant granted in excess of the prayer of the petition is not a good ground of Suspension and Liberation where the excess is distinct and can be separated from the rest of the warrant by a restriction to the proper demand. If, however, the excess cannot be so restricted, such an excess is a good ground of Suspension and Liberation.[7]

It is not a good ground of Suspension and Liberation that the warrant to imprison mentions a prison different from the prison mentioned in the prayer of the petition.[8]

Where a charge for a civil debt on which the debtor may be imprisoned is suspended and an *interim* sist of execution has been granted, which has been recalled and the charge found orderly proceeded, the charger cannot incarcerate the debtor without a certificate of refusal being issued. Accordingly, if he does incarcerate the debtor in such circumstances, the debtor will succeed in being liberated.[9]

Lis alibi pendens is a good ground of Suspension and Liberation. Thus, where a second charge was followed by imprisonment while a passed suspension of a first charge was depending, having fallen asleep, a Note of Supension and Liberation was passed without caution.[10]

(4) *Illness of Debtor.* — Where it appears from medical

[1] *Pratt* v *Fleet*, 1826, 4 S. 780 (N.E. 788); *Campbell* v *Robertson*, 1847, 10 D. 125.
[2] *Davies* v *Duncan*, 1861, 23 D. 533.
[3] *Jackson* v *Smellie*, 1865, 4 M. 72.
[4] *Crowder* v *Watson*, 1832, 6 W. & S. 271.
[5] *King* v *Hunter*, 1832, 10 S. 544.
[6] *Muir* v *Barr*, 1849, 11 D. 487.
[7] *Garrioch* v *Wilson*, 1851, 13 D. 1377; *M'Cubbin* v *Fulton*, 1852, 14 D. 908.
[8] *Glenday* v *Johnston*, 1905, 8 F. 24.
[9] *Lynch* v *Buchanan*, 1851, 13 D. 1402.
[10] *Beattie* v *Stodart*, 1838, 16 S. 906. See also *Muir* v *Barr*, 1849, 11 D. 487.

evidence that the following out of a charge, either by actual apprehension and imprisonment, or by the display of the blazon and touching the body of the debtor, will endanger the debtor's life, a Note of Suspension and Interdict of a threatened charge will be passed.[1]

Where the debtor has been incarcerated, Suspension and Liberation is not competent on the ground of sickness, as the party may apply under Act of Sederunt, 14th June, 1671.[2] If, however, the debtor has applied by petition to the Magistrates for liberation on the ground of sickness, with offer of caution, and the application has been refused, a Suspension and Liberation seems to be competent.[3]

(5) *Form of Note.*—The form of the Note is to be found in the Codifying Act of Sederunt, 1913, E. II. 1 (c), which is founded on the Act of Sederunt (Bill Chamber), 24th December, 1838, Forms of Notes of Suspension, No. III.

In a Suspension and Liberation where objection was taken that the prayer only asked for suspension of the charge and its grounds and warrants, and did not ask for suspension of the warrant of imprisonment, Lord Justice Clerk Inglis pointed out that the Act of Sederunt, 24th December, 1838, provided forms for notes of suspension in schedules which were intended as guides to practitioners, but not as forms which were to be followed to the letter in every case, and that it was meant that the prayer of the Note should be altered from the form in the schedule according to the circumstances of each case, so as to comply with the provisions of the Act of Parliament (1 & 2 Vict. cap. 86, sec. 4) that it should set forth the relief or remedy craved.[4]

(6) *Procedure.*—The procedure in a Note of Suspension and Liberation is similar to that in a simple suspension, only the former procedure is more summary. The first interlocutor is usually "To see and answer within 48 hours and to be intimated; meantime grants *interim* liberation." Caution is seldom offered or required. In the case where liberation is sought from imprisonment in respect of a wilful failure to pay aliment, it would not be surprising if the Lord Ordinary required

[1] *Johnstone* v *Glen*, 1850, 12 D. 903.
[2] *Goodsir* v *Fleming*, 1829, 7 S. 351.
[3] *Bell* v *Sterry & Co.*, 10th December, 1825, 4 S (N.E.) 201 (note) and 306 (note); Beveridge on the Bill Chamber, p. 22, sec. 108.
[4] *Wilson* v *Stronach*, 1862, 24 D. 271 at p. 275.

caution, as in such a case imprisonment is only awarded by the Sheriff where he is satisfied that the debtor is able to pay but wilfully refuses to do so. In a case in the year 1908[1] of suspension and liberation where the complainer was imprisoned for wilful failure to pay aliment, caution was ordered, but there caution had been offered.

A full copy of the Note must be served.[2]

After the Note is passed the Note "may be carried into effect "as heretofore,"[3] *i.e.*, as prior to December, 1838. The practice prior to that date was that if the interlocutor passing the Note was acquiesced in, or the Lord Ordinary did not prohibit the issue of the certificate of passing the Note, the certificate of passing the Note was *at once* issued, and its production to the jailer was sufficient to secure the prisoner's release.[4]

(7) *Reclaiming Note.*—See *Suspension, supra*, p. 41.

[1] *Currie* v *Goudie* (unreported), before Lord Guthrie.
[2] A.S., 21st July, 1675; Shand's Practice, p. 264.
[3] A.S. (Bill Chamber), 24th December, 1838, sec. 8; C.A.S., E. II. 21.
[4] Beveridge on Bill Chamber, p. 82.

CHAPTER V.

SUSPENSION OF DECREES.

(1) *Suspension of Decrees in foro.*—(*a*) *Decrees in the Court of Session.*—Suspension of a decree *in foro* pronounced in the Court of Session is incompetent.[1] The diligence upon such a decree may, however, be suspended in respect that the debt has been paid since the date of the decree, or that the diligence is irregular.[2] In such cases the Note of Suspension is in the terms of C.A.S., E. II. 1 (c), with an articulate statement of facts and pleas in law.

A decree by default is a decree *in foro*,[3] and will not be suspended even though the default was caused by the inadvertence of the agent.[4]

(*b*) *Decree in the Sheriff Ordinary Court*—

(i.) *Where competent.*—A decree *in foro* pronounced in the Sheriff Ordinary Court may be reviewed by a Note of Suspension in the Bill Chamber, where the decree is extracted;[5] where appeal is competent but the time for appealing has expired;[6] and where appeal is excluded but suspension is not specially excluded;[2] provided that the value of the suspension exceeds £50 sterling,[7] and that the interlocutor under review is an appealable interlocutor[8] and has not been implemented.[9]

While the general rule is that the decree must

[1] Beveridge, p. 78, sec. 368; *Young* v *List & M'Hardie*, 1862, 24 D. 587, per L.J.C. Inglis, p. 588; *Paul* v *Henderson*, 1867, 5 M. 1120, per Lord Cowan, p. 1125. See also *Hamilton* v *Marshall*, 25th November, 1813, F.C.; Hume's Decisions, p. 497; *Irvine* v *Valentine*, 1793, 3 Pat. App. 287.

[2] *Paul* v *Henderson*, 1867, 5 M. 1120.

[3] *Maule* v *Tainsh*, 1878, 6 R. 44.

[4] *Lumsdaine* v *Australian Co.*, 1834, 13 S. 215; *Macpherson* v *Graham*, 1863, 1 M. 973; *Maule* v *Tainsh*, 1878, 6 R. 44.

[5] Shand's Practice, p. 459; *Turner* v *Gray*, 1824, 3 S. 235 (N.E. 165).

[6] MacKay's Manual, p. 615.

[7] Sheriff Courts (Scotland) Act, 1907, sec. 7; *Aitchison* v *M'Donald*, 1911, S.C. 174.

[8] Sheriff Courts (Scotland) Act, 1907, sec. 28. MacKay's Manual, p. 615.

[9] *M'Dougall* v *Galt*, 1863, 1 M. 1012, per Lords Deas and Ardmillan, p. 1014.

be extracted, in some cases, such as summary warrants, orders, and interdicts, a Note of Suspension is competent although they are not extracted.[1]

The value of a suspension has been held to be the amount for which the charge has been made, *i.e.*, the decree for both the principal sum and expenses.[2]

A suspension is competent of a decree *ad factum præstandum* whether final[3] or *interim*,[4] but the Note of Suspension must be accompanied by an articulate statement of facts and pleas in law.[5]

A suspension of a warrant in an action of removing or of ejection is the proper mode of review.[6]

It is competent to suspend a warrant to imprison in an action of law burrows,[7] or in an action against an apprentice for desertion.[8]

Where a decree on the merits has been implemented, but a decree for expenses annexed to such decree has not been implemented, a suspension of a charge on the decree for expenses is incompetent,[9] except where the question of expenses does not depend upon the merits, or where the objection to the decree for expenses is independent of the merits.[10]

In the same way a suspension of a decree for expenses annexed to a decree of absolvitor is generally incompetent.[11]

[1] *Hunter* v *Turnbull & Ponton*, 1824, 2 S. 786 (N.E. 650); *M'Vey & Buchanan* v *Sawers*; *Christie* v *Wilson*, 1825, 4 S. 70, 71 (N.E. 73, 74).

[2] *Aitchison* v *M'Donald*, 1911, S.C. 174; *cf. Bryson* v *Belhaven Engineering and Motors, Ltd.*, 1908, 15 S.L.T. 1043.

[3] *Lamb* v *Thompson*, 1901, 4 F. 88.

[4] *Flowerdew* v *How*, 1852, 15 D. 198; *Wilson* v *Bartholomew*, 1860, 22 D. 1410; *Caledonian Railway Co.* v *Cochran's Trustees*, 1897, 24 R. 855.

[5] C.A.S., E. II. 1 (*c*).

[6] Judicature Act, 1825 (6 Geo. IV. cap. 120), sec. 44; *Fletcher* v *Davidson*, 1874, 2 R. 71; *Campbell's Trustees* v *O'Neill*, 1911, S.C. 188.

[7] *Brock* v *Rankine*, 1874, 1 R. 991; Civil Imprisonment (Scotland) Act, 1882, sec. 6.

[8] *Cameron* v *Murray*, 1866, 4 M. 547. See also 38 & 39 Vict. cap. 90.

[9] *M'Dougall* v *Galt*, 1863, 1 M. 1012; *cf. Tweddel* v *Duncan*, 1840, 2 D. 808.

[10] *Scott* v *King*, 1831, 10 S. 67 (note); *Whyte* v *Vallance*, 1835, 13 S. 470; *M'Dougall* v *Galt*, 1863, 1 M. 1012, per Lord Ardmillan, p. 1014.

[11] *Scott* v *King*, 1831, 10 S. 67; *Whyte* v *Vallance*, 1835, 13 S. 470; *Simpson* v *Young*, 1852, 14 D. 990; *Findlay* v *Reid's Trustees*, 1854, 16 D. 938; *M'Dougall* v *Galt*, 1863, 1 M. 1012, per Lord Deas, p. 1014; *cf. Douglas* v *Samuel*, 1828, 6 S. 461; *Miller* v *Miller*, 1829, 7 S. 617; *Menzies* v *Caldwell*, 1834, 12 S. 772.

A decree of absolvitor cannot be suspended.[1]

It is incompetent to suspend a charge under a warrant for execution pending appeal to the House of Lords.[2]

It is incompetent to suspend a decree which has become final by default,[3] or which is averred to have been obtained by fraud.[4]

Suspension of a decree for a sum not exceeding £50 sterling has been held not to be competently presented in the Bill Chamber.[5]

Where the ground of suspension is competent and omitted in the Sheriff Court proceedings, the suspension will be refused.[6]

Where other opportunities of review have not been taken advantage of, review by suspension is incompetent.[7]

(ii.) *Procedure in the Bill Chamber.*—Where full caution is offered by the complainer the form of the Note of Suspension (except in the case of a suspension of a decree in an action of removing) is in terms of C.A.S., E. II. 1 (a), and no statement of facts and note of pleas in law are required. The Note is signed by an agent in the Court of Session, recites the import and effect of the decree sought to be suspended, and sets forth in the prayer the relief or remedy craved. The presentment of the Note, on being certified by the Clerk, operates as an *interim* sist of diligence. On caution being found for implement of the decree and also for such expenses as may be incurred in the Court of Session, the Note is passed as a matter of course by the Lord Ordinary on the Bills. A certified notice of the Note having been passed is then transmitted to the Clerk in the inferior Court, and

[1] *Danish Asiatic Co.* v *Earl of Morton*, 24th February, 1741; Elchies' Decisions *voce* Suspension, No. 5.

[2] *Clyne's Trustees* v *Clyne*, 1837, 16 S. 191.

[3] *Watt Brothers & Co.* v *Foyn*, 1879, 7 R. 126.

[4] *Smith* v *Kirkwood*, 1897, 24 R. 872.

[5] *Bryson* v *Belhaven Engineering and Motors, Ltd.*, 1908, 15 S.L.T. 1043.

[6] *Rennie* v *James*, 1908, S.C. 681. See also *Ewing* v *Wallace*, 1832, 6 W. & S. 222.

[7] *West Highland Railway Co.* v *Grant*, 1902, 10 S.L.T. 413.

the process is forthwith transmitted to the Court of Session.[1] The Note and interlocutor passing the same is served on the opposite party in common form, and after the expiry of 15 days the cause may be enrolled before the Lord Ordinary to whom it is marked.[2]

Where the decree is proposed to be suspended *without* caution, or on juratory caution, or where the decree is a decree in a removing, the Note of Suspension is in terms of C.A.S., E. II. 1 (c), and requires an articulate statement of facts and note of pleas in law. Such a Note is laid before the Lord Ordinary on the Bills, who may pronounce such order or interlocutor as shall be just; and where answers are ordered, such answers shall be in a similar form to the reasons of suspension.[3] The Lord Ordinary may refuse the Note on presentment if he considers the ground of suspension is inadequate. If he passes the Note it can only be after answers have been ordered, as the respondent is entitled to be heard on the question of caution. In the same way, if the Lord Ordinary intends to remit the case to the inferior Court with instructions, he can only do so after hearing counsel and after receiving a written answer on the part of the respondent.[4] The Lord Ordinary, before passing or refusing a Note to which it is competent to appoint answers to be made, may order production in the Bill Chamber of the proceedings in the inferior Court brought under his review, and the complainer must within such time as the Lord Ordinary may direct, produce to the Clerk of the inferior Court a certified copy of the interlocutor ordering such production. Should the complainer fail to do so, the Note is refused and expenses found due.[5]

Where consignation is offered the same pro-

[1] 1 & 2 Vict. cap. 86, sec. 4; C.A.S., E. II. 15.
[2] 1 & 2 Vict. cap. 86, sec. 4; Court of Session Act, 1868, sec. 90.
[3] 1 & 2 Vict. cap. 86, sec. 4.
[4] 1 & 2 Geo. IV. cap. 38, sec. 1.
[5] C.A.S., E. II. 14.

cedure is observed as is provided with regard to suspensions *without* caution or on juratory caution.[1]

(iii.) *Procedure in Court of Session.*—In suspensions which require an articulate statement of facts to be annexed to the Note, and answers have been lodged thereto, where a record has been made up and closed and a proof led and concluded before the Inferior Judge, the Lord Ordinary before whom the suspension is enrolled in the Court of Session shall, at the first calling of the cause, if a motion to that effect be made by either of the parties, appoint such record and proof, with any other papers which may be deemed to be necessary, to be printed and boxed for the Judges of the Inner House, and shall report the cause to the Inner House, who shall thereupon proceed to dispose of it in the same way and manner as if it had been reported by the Lord Ordinary upon a closed record prepared in the Court of Session; and the party by whom such motion is made shall defray in the first instance the expense of such printing.[2] If neither party moves to have the Note of Suspension reported to the Inner House the parties proceed to make up a record in the Outer House.

Where the Note has been presented on full caution, and consequently no reasons of suspension are appended thereto, the complainer may be ordered to lodge reasons of suspension and the respondent to lodge answers thereto within a certain period; or the record in the inferior Court may he held to be the record in the Court of Session. In the former case the complainer prints, and the record is closed on the reasons of suspension and answers thereto as in an ordinary Court of Session action, and the inferior Court record, proof, productions, &c., are printed as an appendix. In the latter case the complainer prints, and the record is closed on the Note of Suspension and the inferior Court record.

[1] C.A.S., E. II. 26.

[2] 13 & 14 Vict. cap. 36, secs. 9 and 32; *Scott's Executors* v *Hepburn*, 1876, 3 R. 816.

When the Note has been presented without caution, or on juratory caution or consignation, it is unnecessary to order reasons of suspension and answers thereto to be lodged, and these are accordingly adjusted and the record closed as in an ordinary action in which defences have been lodged.[1]

Where the Lord Ordinary on the Bills advises and *refuses* a Note of Suspension of a decree proceeding on a proof, he must distinctly specify in his interlocutor the several facts material to the case which he finds to be established by the proof, and express how far his judgment proceeds on the matter of fact so found, or on the matter of law, and the several points of law which he means to decide.[2]

(*c*) *Decree in the Sheriff Small Debt Court.*—A suspension of a decree *in foro* pronounced in the Sheriff Small Debt Court is incompetent,[3] except in cases where there has been essential illegality in the procedure, in which case a Note of Suspension may be presented in the Bill Chamber.[4] In the latter class of case the form of the Note depends upon whether caution is offered at the presentment of the Note or not, and the procedure is similar in this and other respects to the procedure in suspensions of decree *in foro* in the Sheriff Ordinary Court.

(*d*) *Decree in an Inferior Court other than the Sheriff Courts.*—Suspension is competent in all actions concluding for less than £12 even before extract,[5] and in cases where no charge is necessary, as in warrants of the Dean of Guild Court.[6] Otherwise suspension is incompetent before extract.

[1] *Scott's Executors* v *Hepburn*, 1876, 3 R. 816.

[2] C.A.S., E. II. 19; 6 Geo. IV. cap. 120, sec. 40.

[3] Small Debt Act, 1837 (7 Will. IV. and 1 Vict. cap. 41), secs. 30 and 31.

[4] *Manson* v *Smith*, 1871, 9 M. 492; *Brown* v *Rodger*, 1884, 12 R. 340; *cf.* *Keene* v *Aitken*, 1875, 12 S.L.R. 308; *Spalding* v *Valentine & Co.*, 1883, 10 R. 1092.

[5] *Scott* v *Shaw*, 1826, 4 S. 462 (N.E. 468); *Scoular* v *M'Laughlan*, 1864, 2 M. 955; Shand's Practice, p. 452. See also Erskine's Inst. iv. 3, 8; *Findlay & Co.* v *Gillies*, 1822, 2 S. 98 (N.E. 92); *Galletly* v *Child*, 1824, 3 S. 142 (N.E. 95); *Swan* v *Craig*, 1825, 4 S. 12.

[6] *Hunter* v *Turnbull*, 1824, 2 S. 786 (N.E. 650); *Christie* v *Wilson*, 1825, 4 S. 71 (N.E. 74).

A suspension of a decree may be presented where the inferior Court clearly exceeds its powers,[1] even where the jurisdiction of the Court is excluded.[2]

The procedure is dependent upon whether caution is offered at the presentment of the Note of Suspension or not, and is similar to the procedure in suspensions of decrees *in foro* of the Sheriff Ordinary Court.

Where there are other methods of review provided, suspension is incompetent.[3]

(2) *Suspension of Decrees in Absence.*

(*a*) *Decree in the Court of Session.*[4]

(i.) *Generally.*—Where the days of recall of a decree in absence in terms of section 23 of the Court of Session Act, 1868, have expired without the decree having been recalled, it is possible to suspend it so long as the decree has not become equal to a decree *in foro*, has not become final, or has not been implemented.

A decree in absence becomes entitled to all the privileges of a decree *in foro* where it is an unrecalled decree upon which a charge is competent after personal service of the summons on the defender, or after the entering of appearance for such defender with his authority, and in each case upon the lapse of 60 days after the expiry of a charge upon it; and a decree of declarator, or any other decree in which a charge is not competent, obtained in absence after such personal service or appearance as aforesaid is final after the lapse of twenty years from its date, unless the same before that time has been lawfully recalled or brought under review by suspension or reduction.[5] In other cases a decree in absence does not become final for forty years.[6] Where a decree in absence

[1] *Bruce* v *Irvine*, 1835, 13 S. 437.
[2] *Campbell* v *Brown*, 1829, 3 W. & S. 441; *Miller* v *M'Callum*, 1840, 3 D. 65.
[3] *West Highland Railway Co.* v *Grant*, 1902, 10 S.L.T. 413.
[4] 1 & 2 Vict. cap. 86, sec. 5.
[5] Court of Session Act, 1868, sec. 24.
[6] *Sinclair* v *Brown*, 1835, 13 S. 594; 2 S. & M'L. 103; 1837, 15 S. 770; *Scott* v *Handyside's Trustees*, 1868, 6 M. 753; *Grieve or Dingwall* v *Burns*, 1871, 9 M. 582.

has been implemented,[1] or acquiesced in,[2] suspension of the decree is incompetent; and where the decree has been implemented on its merits, a suspension as regards a threatened charge for expenses is also incompetent.[3]

Suspension of a decree in absence is not limited to cases where a charge is competent.[4] Thus, where the decree in absence was one of reduction;[5] or where, in respect of no appearance, a warrant for imprisonment was granted,[6] it was held that suspension was competent. Where, however, the defender had actually been imprisoned on the warrant, his remedy was held not to be by suspension but by a formal Suspension and Liberation,[7] except in the case of law burrows, where the warrant of imprisonment is issued at once.[8]

Where a decree in absence had gone out and the defender presented a Note of Suspension which ultimately came to be enrolled before the Lord Ordinary as a defended cause, and where after procedure the defender was ordered to lodge answers and failed to do so, it was held that the second decree was not in absence and could not be suspended.[9]

(ii.) *Procedure.*—The suspension is brought by lodging in the Bill Chamber a Note of Suspension of the form and effect of Notes of Suspension brought of decrees *in foro* of inferior Courts;[10] and, on consignation in the hands of the clerk of such expenses as may have been decerned for, such Note of Suspension is received and marked by the

[1] *Macintosh* v *Robertson*, 1830, 9 S. 75; *Wotherspoon* v *Winning*, 1849, 11 D. 371. See also *Stephenson* v *Dobbins*, 1852, 14 D. 510.

[2] *Ewing* v *Cheape*, 1835, 13 S. 515.

[3] *M'Dougall* v *Galt*, 1863, 1 M. 1012. See also *Scott* v *King*, 1831, 10 S. 67; *Whyte* v *Vallance*, 1835, 13 S. 470; *Simpson* v *Young*, 1852, 14 D. 990; *cf.* *Tweddel* v *Duncan*, 1840, 2 D. 808.

[4] *Lowson* v *Reid*, 1861, 23 D. 1089.

[5] *Grant* v *Sillars and Marshall*, 1863, 1 M. 1167; *Newton* v *Couper*, 1865, 3 M. 573.

[6] *Cameron* v *Murray and Hepburn*, 1866, 4 M. 547.

[7] *M'Phun* v *Marshall*, 1842, 4 D. 418.

[8] *Brock* v *Rankine*, 1874, 1 R. 991. See also *Gadois* v *Baird*, 1856, 28 Jur. 682.

[9] *Munro* v *Rose*, 1854, 16 D. 476. See also *Watson* v *Brown*, 1807, Hume, 653.

[10] C.A.S., E. II. 1. (*b*); Court of Session (No. 1.) Act, 1838 (1 & 2 Vict. cap. 86), sec. 5.

Clerk of the Bills, and is thereupon laid before the Lord Ordinary on the Bills and passed as a matter of course. The interlocutor is in the following terms:—"The Lord Ordinary "passes the Note in terms of the Act 1 & 2 Vict. "cap. 86, sec. 5." If consignation is not offered the complainer will be allowed to amend in order to do so.[1] The Note of Suspension and interlocutor passing the same is then served upon the opposite party in common form. After the lapse of 15 days the case may be enrolled before the Lord Ordinary who has granted the decree in absence.[2] The first motion usually is to ask the Lord Ordinary to grant warrant for the transmission of the original process. A Note must be presented to the Lord Ordinary intimating that he will be moved to grant such a warrant, and a copy of the Note is served upon the Extractor or the Keeper of the Records, as the case may be, 48 hours previous to the granting of the warrant. A certificate of such notice is endorsed on the process copy of the Note.

The Note is in the following form:—

"Note for A B in the Suspension at his "instance against C D Respondent.

"My Lord ——, The respondent in this process "having upon the——day——obtained decree in "absence before your lordship against the com- "plainer, the proceedings were on or about—— "last transmitted to the Extractor of Court, and an "extract of the decree was thereupon issued.

"The complainer having, in terms of the Act of "Parliament, 1 & 2 Vict. cap. 86, sec. 5, presented a "Note of Suspension of said decree, the same was "passed by the Lord Ordinary on the Bills, and "having been served upon the opposite party, and "lodged in Court, now stands in your lordship's roll "for——next, when your lordship will be moved to "grant warrant upon the Keepers of the Record (*or* "the Extractor in whosesoever hands the process

[1] *Mackenzie* v *Cameron*, 1853, 15 D. 888; 1 & 2 Vict. cap. 86, sec. 5.

[2] 1 & 2 Vict. cap. 86, sec. 5.

"may happen to be) to transmit the same to the "Clerk of Court, in order that your lordship may "thereafter proceed in the cause in common form, "in terms of the statute."

(Signature of Counsel.)

The interlocutor is usually in the following terms :—

"Edinburgh——.—In respect of the certificate "of intimation produced, No.——of process, grants "warrant to, and authorises and ordains the Keeper "of the Records (*or* the Principal Extractor of the "Court of Session) to transmit to the Clerk of this "process the original process between the parties."

The Lord Ordinary's interlocutor granting warrant may also deal with the question of expenses. He may give to the respondent all or part of the expenses consigned by the complainer, and he may, in the same way, give or refrain from giving to the complainer the remainder of the expenses consigned. If the Lord Ordinary awards to the respondent only a portion of the sum consigned, the complainer has no statutory right to the balance.[1] In one case, as a condition of being allowed to proceed with the suspension of a decree in absence, the complainers were held bound to make payment of the expenses incurred in extracting and following out the decree, but not of further expenses incurred by the respondents in obtaining a warrant upon the party in charge of the estate to pay it over to them.[2]

On the warrant being granted a certified copy of the Note and interlocutor is handed to the Extractor or the Keeper of the Records, who places the same, along with the Clerk's receipt, in the place of the transmitted process, and the process is then transmitted. The cause is thereafter enrolled in order that a record may be made up in the suspension, and the first interlocutor usually appoints

[1] *Roxburgh and Faulds* v *Pollok*, 1856, 18 D. 795.

[2] *Newton* v *Couper*, 1865, 3 M. 573.

the suspender to lodge reasons of suspension within eight days and the respondent to lodge answers thereto within a like period thereafter, and conjoins the original process with the suspension. The record is then adjusted and closed on the aforesaid reasons and answers, with the original summons as an appendix. In some cases, however, the condescendence in the original summons is held to be the condescendence in the suspension, and the suspender is allowed to put in defences within a certain time, or, if ready, at once, and the record is closed in the usual way. The case then goes on in all respects as an ordinary Outer House cause, the only difference being that the *onus* has shifted, and the suspender must show that the decree should not have been pronounced.

(iii.) *Effect of Suspension.*—The suspension of a decree in absence is not a reponing. It does not take away the effect of diligence, but leaves it in force if the reasons of suspension are repelled. It operates merely as a sist of diligence.[1]

(iv.) *Where Decree is Null.*—In order that consignation of expenses may be exigible, the decree in absence must be regularly pronounced in Court against a party duly called. Accordingly, where the party is not properly called, consignation of expenses is not required, and the Note of Suspension is passed *simpliciter*.[2] Such a suspension is brought under 1 & 2 Vict. cap. 86, sec. 6, and requires an articulate statement of facts and pleas in law.

(*b*) *Decree in the Sheriff Ordinary Court.*—As a defender may be reponed at any time before implement of a decree in absence[3] it follows that where a defender has allowed a decree in absence to be taken through mistake or inadvertence, suspension in order to be reponed is incompetent. Where, however, a defender has deliberately refused to enter appearance so that

[1] *Keltie* v *Wilson*, 1828, 7 S. 208; *Edinburgh, Perth and Dundee Railway Co.* v *Rowan*, 1852, 14 D. 1001; *Moir* v *Doughtie*, 1853, 15 D. 380.

[2] *Downie* v *Peebles*, 1841, 4 D. 117.

[3] Sheriff Court (Scotland) Act, 1907. Rule 27.

he might subsequently present a suspension, a Note of Suspension may be presented in the Bill Chamber so long as the decree has not been implemented and the value of the suspension exceeds £50 sterling.[1]

The Note of Suspension is in the form set forth in the Codifying Act of Sederunt, E. II. 1 (c), and there should be annexed to such Note an articulate statement of facts on which such suspension is founded, together with a Note of pleas in law; and such Note of Suspension shall be received and marked by the Clerk of the Bills, and be forthwith laid before the Lord Ordinary on the Bills, who shall pronounce such order or interlocutor thereon as may be just; and such Note and order or interlocutor thereon shall be served on the opposite party in common form, and shall be answered in a similar form to the reasons of suspension: provided always that the practice as to caution in such cases and power to reclaim to the Inner House shall remain as at present.[2]

The question of caution is in the discretion of the Judge. Of two recent cases the complainer in one case found caution,[3] and in the other was not required to find caution.[4]

The Lord Ordinary may refuse the Note of Suspension *de plano*; or, on answers, may pass or refuse it; or, with or without answers, may remit to the inferior Court with instructions.[5]

(*c*) *Decree in the Sheriff Small Debt Court.*—It is incompetent to raise in the Bill Chamber a suspension of a Small Debt decree except where there is a fundamental nullity.[6] Where the amount contained in the decree has been paid or extinguished since the date

[1] *Bryson* v *Belhaven Engineering and Motors, Ltd.*, 1908, 15 S.L.T. 1043; *Aitchison* v *M'Donald*, 1911, S.C. 174; Sheriff Courts (Scotland) Act, 1907, secs. 5 (5) and 7.

[2] 1 & 2 Vict. cap. 86, sec. 6.

[3] *Bryson* v *Belhaven Engineering and Motors, Ltd.*, 1908, 15 S.L.T. 1043.

[4] *Aitchison* v *M'Donald*, 1911, S.C. 174.

[5] 1 & 2 Geo. IV. cap. 38, sec. 1.

[6] *Christie Bros.* v *Remington Typewriting Co.*, 1912, 1 S.L.T. 123. See also *Crombie* v *M'Ewan*, 1861, 23 D. 333; *Manson* v *Smith*, 1871, 9 M. 492; *Lennon* v *Tully*, 1879, 6 R. 1253; *Brown* v *Rodger*, 1884, 12 R. 340; *Christie* v *Hoseason*, 1898, 6 S.L.T. 123; *Curdie* v *Hay*, 1902, 10 S.L.T. 435.

of the decree, the complainer may proceed by way of an ordinary suspension in the Bill Chamber.[1]

It is competent to suspend any proceedings subsequent to the date of a Small Debt decree in absence which are irregular.[2] The Note of Suspension is in terms of C.A.S., E. II. 1 (c) with an articulate statement of facts and note of pleas in law.

The usual method of opening up a decree in absence pronounced in the Small Debt Court is by obtaining a rehearing in terms of section 16 of the Small Debt Act, 1837.

(*d*) *Decree in an Inferior Court other than the Sheriff Courts.*—Where decrees in absence are pronounced in inferior Courts other than the Sheriff Courts, suspensions presented in the Bill Chamber *in causes under £12 value* are refused and remitted by the Lord Ordinary on the Bills to the inferior Judge, if he be competent, the defender always, before being heard on his defences in the inferior Court, paying to the pursuer, or consigning in the hands of the clerk of said inferior Court, the expense incurred by the pursuer in the first process decree and charge thereon, and also the expense incurred in the Bill Chamber as the latter shall be modified by the Lord Ordinary on the Bills; but no remit upon such Note of Suspension shall import a sist of diligence unless the Note and remit be intimated to the charger and lodged with the clerk of the inferior Court, after which the charger may again insist in his action without the necessity of any new citation, and the inferior Judge is authorised and required to proceed and determine therein until the final conclusion thereof.[3] The procedure for the recovery of the expenses incurred by the charger on the first process decree and charge thereon, is detailed in the Act of Sederunt, 10th July, 1839, Part I., chapter xx., section 129, which, although repealed,[4]

[1] *Samuel* v *MacKenzie and Bell*, 1876, 4 R. 187.

[2] *Gray* v *Smart*, 1892, 19 R. 692.

[3] C.A.S., E. II. 4; A.S., 11th August, 1787, sec. 4; *Poustie* v *Scott*, 4th May, 1911, Lord Dewar (unreported).

[4] *Inglis' Trustees* v *Macpherson*, 1910, S.C. 46.

may still give some guidance in respect that no new procedure has been substituted therefor.

Where the cause is above £12 in value, a suspension in terms of section 6 of the Court of Session (No. 1) Act, 1838, is competent.

The Note of Suspension must contain a statement of facts and note of pleas in law, and the suspender must offer caution or consignation where that is necessary.[1] In such proceedings the Lord Ordinary may refuse *de plano;* or, on answers, may pass or refuse; or, with or without answers, remit to the inferior Court with instructions.[2]

[1] C.A.S., E. II. 1 (*c*).

[2] 1 & 2 Geo. IV. cap. 38, sec. 1.

CHAPTER VI.

PETITIONS RELATIVE TO JUDICIAL FACTORS.

I.—Generally.

(1) *Definition of Judicial Factors.*—A judicial factor is an officer appointed by a competent Court to safeguard the estates of persons under disability of any kind, or estates whose ownership or administration is disputed.[1] He is a conservator merely, appointed to collect and administer the funds placed under his charge.[2]

The term "Judicial Factor" includes factor *loco tutoris*, factor *loco absentis* and *curator bonis*,[3] as well as a factor appointed on a trust estate or upon the estate of a person incapable of managing his own affairs.[4]

Judicial Factors are trustees within the meaning and for the purposes of the Trusts Acts.[5] The latter Acts are retrospective in their effect.[6]

(2) *Jurisdiction.*

(*a*) *Junior Lord Ordinary.*—By the Distribution of Business Act, 1857,[7] petitions and applications for the appointment of Judicial Factors, factors *loco tutoris*, or *loco absentis*, or *curators bonis*, or by such factors or curators for extraordinary or special powers, or for exoneration and discharge, and all petitions, applications and reports under the Judicial Factors Act, 1849,[8] must be presented to the Junior Lord Ordinary.[9] Where petitions for the appointment of Judicial Factors are presented pending the

[1] *Dowie* v *Hagart*, 1894, 21 R. 1052, per Lord M'Laren, p. 1057.

[2] *Neilson, &c., Petitioners*, 1865, 3 M. 559, per L.J.C. Inglis, p. 560.

[3] Judicial Factors Act, 1849, sec. 1; 47 & 48 Vict. cap. 63, sec. 2.

[4] 47 & 48 Vict. cap. 63, sec. 2.

[5] *Accountant of Court* v *Crumpton's Curator Bonis*, 1886, 14 R. 55.

[6] *Scott* v *Craig's Representatives*, 1897, 24 R. 462, per Lord Kincairney.

[7] 20 & 21 Vict. cap. 56, sec. 4. See also 52 & 53 Vict. cap. 39, sec. 14.

[8] 12 & 13 Vict. cap. 51.

[9] *Smith* v *Smith*, 1892, 20 R. 27; *Gaff, &c., Petitioners*, 1893, 20 R. 825.

result of litigation,[1] or are petitions incident to actions or causes actually depending at the time of presenting the same,[2] they are not presented to the Junior Lord Ordinary. An objection to the competency of a petition for the appointment of a Judicial Factor on the ground that it was incident to an action of interdict then pending in the Sheriff Court and should have been presented not to the Junior Lord Ordinary but to the Inner House, was repelled on the ground that the Act of 1857 did not apply to pending actions in the Sheriff Court.[3]

A petition for the appointment of a Judicial Factor when accompanied by sequestration of the estate,[4] or by a dissolution of partnership,[5] is competent only before the Junior Lord Ordinary.

A petition for the appointment of an *interim* Judicial Factor under the Companies Clauses Consolidation (Scotland) Act, 1845, section 57, is competent before the Junior Lord Ordinary.[6]

Petitions for the recall of a curator *bonis* and for the appointment of a new curator have been held, after a conference between the Judges of the two Divisions, to be only competent before the Junior Lord Ordinary.[7]

A petition for the recall of a Judicial Factor appointed under section 164 of the Bankruptcy Act, 1856, was held to be competently presented to the Junior Lord Ordinary.[8]

A petition for the removal of a *curator bonis* is competently presented to the Junior Lord Ordinary,[9] who can also discharge a Judicial Factor and trustee in a sequestration.[10]

[1] *Speirs* v *Speirs*, 1877, 5 R. 75. See also *Rintoul, Petitioner*, 1862, 1 M. 214. See, however, *Blackwood* v *Reith*, 1906, 13 S.L.T. 629.

[2] 20 & 21 Vict. cap. 56, sec. 4; *Dixon's Tutor, Petitioner*, 1867, 5 M. 1052.

[3] *Booth* v *Mackinnon*, 1908, 15 S.L.T. 848.

[4] *Rhind* v *Sheach*, 1875, 2 R. 1002; *Smith* v *Smith*, 1892, 20 R. 27; *Gaff, &c., Petitioners*, 1893, 20 R. 825.

[5] *Wallace* v *Whitelaw*, 1900, 2 F. 675. See also *Macnabs* v *Macnab*, 1912, S.C. 421.

[6] *Wright* v *Cart Navigation Trustees*, 1904, 11 S.L.T. 708.

[7] *Souter* v *Finlay*, 1890, 18 R. 86. See also *Kyle, Petitioner*, 1862, 24 D. 1083; *Tweedie, Petitioner*, 1886, 14 R. 212; *Forrest* v *Forrest's Judicial Factor*, 1898, 6 S.L.T. 68; *cf. Sinclair, Petitioner*, 1886, 23 S.L.R. 737.

[8] *Masterton* v *Erskine's Trustees*, 1887, 14 R. 712. See section 163 of the Bankruptcy Act, 1913.

[9] *Marshall* v *Chisholm*, 1901, 3 F. 642.

[10] *Duke* v *Somervell*, 1903, 11 S.L.T. 289.

(*b*) *Any Lord Ordinary.*—Petitions under the Trusts Acts, 1867, for power to a sole trustee to resign[1] and for the appointment of a Judicial Factor may be presented to any Lord Ordinary.[2] Immediately after the appointment is made the proceedings are remitted to the Junior Lord Ordinary under whose supervision the remaining steps in the petition are taken.

(*c*) *Inner House.*—It has been decided that the Inner House alone has jurisdiction to appoint a Judicial Factor pending the result of litigation in the Court of Session,[3] although in a recent case such an appointment was made by the Junior Lord Ordinary.[4] Where the pending litigation is in the Sheriff Court, the petition for appointment may be presented to the Junior Lord Ordinary.[5]

Where there is a deadlock in a trust the Inner House may sequestrate the trust estate and appoint a Judicial Factor;[6] and where a trustee has been guilty of breach of trust the Inner House may remove him and appoint a Judicial Factor.[7]

(*d*) *In Vacation.*—The Lord Ordinary on the Bills acts not only in petitions relating to Judicial Factors which are competently presented to the Junior Lord Ordinary during session,[8] but also in petitions which are outwith his jurisdiction during session.[9]

(3) *Appointment.*

(*a*) *Form of Petition.*—The petition is addressed "Unto "the Right Honourable the Lords of Council and "Session." The form then proceeds "The petition of "—— Humbly Sheweth." The designation of the petitioner must be correct otherwise the procedure

[1] Trusts (Scotland) Act, 1867, sec. 10.

[2] *Ibid.*, sec. 16; *M'Math, Petitioner*, 1896, 4 S.L.T. 19.

[3] *Speirs* v *Speirs*, 1877, 5 R. 75. See also *Borthwick, Petitioner*, 1862, 1 M. 104; *Rintoul, Petitioner*, 1862, 1 M. 214.

[4] *Blackwood* v *Reith*, 1906, 13 S.L.T. 629.

[5] *Booth* v *Mackinnon*, 1908, 15 S.L.T. 848.

[6] *Whyte* v *Whyte's Trustees*, 1885, 22 S.L.R. 890; *Paterson, Petitioner*, 1890, 17 R. 1059; *Stewart* v *Morrison*, 1892, 19 R. 1009; *Foggo, Petitioner*, 1893, 20 R. 273; *Henderson* v *Henderson*, 1893, 20 R. 536; *Yuill* v *Ross*, 1900, 3 F. 96. The appointment may also be made by the Junior Lord Ordinary. *Rhind* v *Sheach*, 1875, 2 R. 1002; *Scott, Petitioner*, 1905, 13 S.L.T. 589.

[7] *M'Whirter* v *Latta*, 1889, 17 R. 68.

[8] 20 & 21 Vict. cap. 56, sec. 10; 52 & 53 Vict. cap. 54, sec. 3.

[9] *Primrose* v *Caledonian Railway Co.*, 1851, 13 D. 1214; *Borthwick, Petitioner*, 1862, 1 M. 104.

will require to be commenced of new.[1] Thereafter the facts necessary to explain the prayer of the petition are narrated in short paragraphs, and references to dates are usually made by the dates being put in the margin opposite the expression "of this "date." The petition concludes with a prayer in which the Court is usually craved for intimation of the petition on the walls and in the Minute Book in common form,[2] and for advertisement in certain named newspapers, if advertisement is considered necessary. Then follows a crave for service upon persons named, who should be *all* persons having an interest,[3] even when furth of Scotland,[4] and for answers within a specified time. A general crave for service "on such parties and in such manner as your "Lordships shall think fit" is incorrect.[5] What is desired to be done by the Court is then set forth and the prayer concludes "or to do further or otherwise "in the premises as to your Lordships shall seem "proper." This last clause allows a person other than the nominee mentioned in the petition to be appointed by the Court without a new or amended petition or renewed intimation.[6]

The petition should be prepared or revised,[7] and signed,[8] by counsel. It should be marked with the Division to which it belongs and the words "Junior "Lord Ordinary."[9]

Where there have been prior petitions in the same case a reference to these should be made at the head of the first page.[10]

"A distinctive letter of the alphabet (A, B, C, etc.) "shall be printed in large heavy type on the front

[1] *Maccallum, &c., Petitioners*, 1883, 11 R. 60.

[2] *Hutchison, Petitioner*, 1847, 19 Jur. 347.

[3] *Gordon, &c., Petitioners*, 1832, 11 S. 235; *Fowlds* v *Hodges*, 1836, 15 S. 244; *Russell, Petitioner*, 1855, 17 D. 1005; *Lawson, &c., Petitioners*, 1894, 2 S.L.T. 308.

[4] *Dalrymple* v *Ranken*, 1836, 14 S. 1011.

[5] *Duke of Northumberland, &c., Petitioners*, 1854, 16 D. 803.

[6] *Davidson* v *Bogle*, 1837, 15 S. 421; *Hay* v *Boreland*, 1837, 15 S. 850.

[7] Note dated 14th November, 1855, printed in 18 D. 33.

[8] *Hay* v *Perth Baking Company*, 1823, 2 S. 107 (N.E. 101).

[9] Notice to Agents, dated 21st November, 1857, printed in the Rolls of Court of Session, issued 23rd November, 1857.

[10] *Scott, Petitioner*, 1856, 18 D. 323.

"page, and on the backing of every print boxed to the "Court, so that in each process the letters thus printed "shall follow consecutively. Any print without such "lettering shall not be received by the boxing clerks."[1]

The petition must explicitly state the age of the pupil and the value of the estate, and in the case of an insane person the duration of the insanity and the length of time his funds have been intromitted with by his friends; also, whether the party craved to be appointed has been acting as agent for the pupil or insane person.[2] A particular description of the property,[3] and the names of all parties interested[4] should be given. In petitions for appointment of curators to insane persons, the medical certificates must be produced and printed as an appendix.[5]

The petitioner may suggest a nominee[6] or alternative nominees.[7] In both cases details should be given of the fitness of the nominees for the position.[6] It should be noted that the Court never appoints factors in succession,[8] and if either one, or both, or all of the nominees, refuses or refuse to accept office, the petition must be intimated of new.[9]

A combined application for the appointment of different factors in the same petition is discouraged,[10] except where the application is for a factor *loco tutoris* to the pupil, and a *curator bonis* to the minor, children of the same family, or applications of a like nature.[11]

The prayer should always contain a crave for service upon the party under disability,[12] and the said

[1] C.A.S., A. III. 5.

[2] Regulation, 5th December, 1851, approved of by both Divisions of Court; 1 Stuart, 112; *Mathew, &c., Petitioners*, 1851, 14 D. 312.

[3] *Allan, Petitioner*, 1852, 14 D. 486; *A B, Petitioner*, 1852, 14 D. 849.

[4] *Russell, Petitioner*, 1855, 17 D. 1005.

[5] *Kenmore, Petitioner*, 1849, 11 D. 1494; *Wright, Petitioner*, 1849, 12 D. 912; *Robertson, Petitioner*, 1853, 16 D. 317.

[6] *Anderson, Petitioner*, 1854, 17 D. 97.

[7] *Dow, &c., Petitioners*, 1847, 9 D. 616; *Thomson, &c., Petitioners*, 1851, 14 D. 311.

[8] *Dow, &c., Petitioners*, 1847, 9 D. 616.

[9] *Scouller, &c., Petitioners*, 1834, 13 S. 101; *Thomson, &c., Petitioners*, 1851, 14 D. 311.

[10] *Learmonth, &c., Petitioners*, 1838, 16 S. 1144.

[11] *Sutherland, &c., Petitioners*, 1851, 13 D. 951; *Fleming, Petitioner*, 1850, 13 D. 951; *Reid, &c., Petitioners*, 1882, 19 S.L.R. 546.

[12] *Gordon, &c., Petitioners*, 1832, 11 S. 235; *Paterson, &c., Petitioners*, 1847, 19 Jur. 690; *Thomson, Petitioner*, 1847, 10 D. 148; *Macgregor, &c., Petitioners*, 1848, 11 D. 285.

party's next-of-kin on both sides.[1] If one of the next-of-kin is insane it will be unnecessary to serve the petition upon him.[2] Personal service upon the *incapax* himself has in special cases been dispensed with.[3] In one case where the *incapax* was confined in an asylum abroad, edictal citation was ordered.[4]

A petition for appointment must contain a crave for sequestration of estate except in the case of a lapsed trust.[5]

A crave for *interim* appointment may be made,[6] such as an appointment pending the reduction of a will.[7] See *Interim Appointment, infra.*

(*b*) *Printing and Boxing.*—All petitions to the Junior Lord Ordinary require to be printed and boxed. Boxing consists of lodging copies of a petition in the enrolling-room at the Parliament House for the use of Judges, Professors, Reporters, Learned Societies, &c., &c., and for this purpose one of the clerks of the Inner House Judges in rotation is in attendance in the box room every lawful day in session, and on the box days in vacation and recess, between the hours of 11 and 1 o'clock for the purpose of receiving and boxing printed papers and marking on the record "copy" that copies have been boxed.[8] In vacation the boxing is done at the first box day after the lodging of the printed petition.

"All petitions, answers, or other printed papers "relative to the appointment of any judicial factor, or "to any judicial factory, shall, when boxed to the "Court, be also boxed to the Accountant of Court."[9]

(*c*) *Productions.*—In petitions for the appointment of a *curator bonis* there must be produced two[10] distinct certificates from separate medical men, on soul and

[1] *Logan, &c., Petitioners*, 1828, 6 S. 477; *Fowlds* v *Hodges*, 1836, 15 S. 244.
[2] *Hamilton, Petitioner*, 1899, 7 S.L.T. 226.
[3] *M'Kechnie, &c., Petitioners*, 1890, 27 S.L.R. 261; *Buyers, Petitioner*, 1910, 2 S.L.T. 201.
[4] *Allison, &c., Petitioners*, 1901, 8 S.L.T. 339.
[5] *Booth* v *Mackinnon*, 1908, 15 S.L.T. 848. See, however, Irons on Judicial Factors, p. 516 *et seq.*
[6] *Lyall, Petitioner*, 1843, 5 D. 1428.
[7] *Blackwood* v *Reith*, 1905, 13 S.L.T. 629.
[8] C.A.S., A. II. 3; A.S. 19th June, 1821, sec. 8.
[9] C.A.S., G. I. 1.
[10] *Robertson, Petitioner*, 1853, 16 D. 317.

conscience,[1] giving in clear and specific terms their opinion that the *incapax* is incapable of the management of his own affairs or of giving directions for their management.[2] As the certificates must be of recent date there should be added the date when the *incapax* was last examined.[3] The principal certificates are lodged along with the principal petition, and copies should be printed along with, and as an appendix to, the petition.[4]

Where the *incapax* is the inmate of a lunatic asylum the certificates must be from doctors unconnected with the asylum.[5]

Forms of certificates may be found in Antonio's Forms and Procedure in the Bill Chamber.[6]

(*d*) *Lodging.*—After prints of the petition have been boxed, the boxing clerk marks upon the principal petition "Boxed," with the date, and the petitioner's agent thereupon makes up a process and lodges it with the Clerk of Court in the same way as in the case of a summons. "Lodging" has been held to satisfy the requirements of "presenting."[7]

(*e*) *First Order.*—Nothing can be done in a petition without an order of Court. Accordingly, after a petition has been boxed and lodged, it appears on the following morning in the Bill Chamber motion roll, when an order for "intimation and service" may be taken,[8] or for "intimation, service, and advertisement" where advertisement is considered necessary, and an order is taken in the same interlocutor upon the respondent, if so advised, to lodge answers thereto within a certain number of days after service. At this stage the Court may take exception to the competency of the petition, but the competency is not usually decided at this stage, any question of competency being reserved for later consideration.[9]

[1] *Campbell, &c., Petitioners*, 1830, 8 S. 307 (note).
[2] *Laidlaw, Petitioner*, 1846, 8 D. 426.
[3] *Lord Advocate, Petitioner*, 1860, 22 D. 555.
[4] *Kenmore, Petitioner*, 1849, 11 D. 1494; *Wright, Petitioner*, 1849, 12 D. 912.
[5] *Knox, &c., Petitioners*, 1894, 2 S.L.T. 388; *Kennedy, Petitioner*, 1901, 8 S.L.T. 415.
[6] P. 98.
[7] *Bain* v *Allan*, 1884, 11 R. 650.
[8] C.A.S., C. III. 1.
[9] *Macfarlane, &c., Petitioners*, 1857, 19 D. 656.

When a petition has been written on it becomes a depending cause.[1]

(*f*) *Intimation.*—Intimation is sometimes used in two different senses. It is sometimes used in the sense of service upon the respondent. When used along with the term "service," as in "intimation and service," it means intimation on the walls and in the Minute Book. For these latter purposes a copy of the first order is written on a print of the petition and a one shilling law Court stamp is affixed thereto, and the print is handed to the hall keeper of the Parliament House, who puts it up on the walls of the lobby of the Parliament House, and a marking is made in the Minute Book by the clerk of the process.

(*g*) *Inducicæ.*—The usual *inducicæ* in petitions is eight days, whether the respondent is within or furth of Scotland.[2] Where the petition is for the appointment of a judicial factor in terms of section 163 of the Bankruptcy (Scotland) Act, 1913, the appointment cannot be made until the lapse of 14 days after the date of publication and service, or such other time as the Court may fix.[3]

(*h*) *Service.*—A copy of the first deliverance written on a copy of the petition and certified by the clerk of Court is the warrant for service.[4]

Service may be by messenger-at-arms, or by post, or service may be accepted.[5]

Where service is by messenger-at-arms the execution of service must be in the *old* style as the new and short form only applies to executions of services in summonses and Notes of Suspension, Suspension and Interdict, and Suspension and Liberation.[6]

Where the petition is served by post, the execution of the service may be written upon a copy petition, with copy deliverance annexed, without the same

[1] *Horn, &c., Petitioners*, 1857, 20 D. 52.

[2] Antonio, p. 138; Thoms on Judicial Factors, pp. 459-60.

[3] C.A.S., G. II. 3; A.S., 6th January, 1914.

[4] Antonio, p. 136, sec. 2; see also *Bruce, &c., Petitioners*, 1899, 7 S.L.T. 256.

[5] *Graham, Petitioner*, 1858, 20 D. 436.

[6] Court of Session Act, 1850 (13 & 14 Vict. cap. 36), sec. 20.

being certified, but in cases of personal service, acceptance of service, and where the petition is served by a messenger, the execution or acceptance of service must be written on a certified copy.[1]

Service can only be accepted by an Edinburgh agent and must be holograph or tested.[2]

In exceptional circumstances personal service on the ward may be dispensed with.[3]

Where the ward is abroad there may be edictal service.[4]

Service must be made within year and day of the date of the first order,[5] and where answers are asked for by a certain day which is named, service must be made immediately after the order for service has been granted.[6]

It is no valid objection to the execution of citation of a petition that it is partly printed and annexed to the petition by gumming.[7]

Where service is made by post, it must be made by a law agent on the roll of the Court of Session.[8]

(*i*) *Amendment of Petition.*—The Court may allow a petition to be amended both before[9] and after[10] intimation and service have been made. In the latter case, however, where the amendment is a material one the Court generally insists upon new intimation and service. Thus, where there was an error in the name of the petitioner, the Court refused to allow intimation, and advertisement already made to stand, and ordered the petition, after being amended, to be commenced of new;[11] and where there was a serious error in the prayer of a petition for carrying into effect a private Act of Parliament under notices required by the Act

[1] Antonio, pp. 136-7.

[2] Antonio, p. 137, sec. 2.

[3] *Frazer, Petitioner*, 1828, 7 S. 205; *Livingstone, Petitioner*, 1835, 13 S. 1033; *Macintyre, &c., Petitioners*, 1850, 13 D. 951; *M'Kechnie, &c., Petitioners*, 1890, 27 S.L.R. 261; *Hamilton, Petitioner*, 1899, 7 S.L.T. 226; *Buyers, Petitioner*, 1910, 2 S.L.T. 201.

[4] *Allison, &c., Petitioners*, 1901, 8 S.L.T. 339.

[5] *Commercial Bank* v *Corstorphine Road Trustees*, 1842, 4 D. 842.

[6] *Duke of Northumberland* v *Harris*, 1832, 10 S. 366.

[7] *Hunter, Petitioner*, 1908, 15 S.L.T. 716.

[8] *Kerr, Petitioner*, 1906, 14 S.L.T. 412.

[9] *Bonthorn, &c., Petitioners*, 1828, 7 S. 215; *Shanklie, &c., Petitioners*, 1854, 16 D. 898.

[10] *Forbes* v *Dalziel*, 1877, 5 R. 328.

[11] *Maccallum, &c., Petitioners*, 1883, 11 R. 60.

a new set of notices was ordered.[1] Where the compearing respondent consents,[2] the Court may allow the petition to proceed after amendment without new intimation and service.

An incompetent petition has been allowed to be amended so as to make it competent.[3]

A correction may be made in a petition even after extract.[4]

Additional petitioners may be sisted.[5]

(*j*) *Interim Appointment.*—A special prayer for an *interim* appointment is usual,[6] although it is not absolutely necessary,[7] in order to secure such an appointment being made. It has been made *ex proprio motu* by the Court,[8] and upon an application in a petition where owing to a reclaiming note a permanent appointment could not at once be made.[9]

In one case the Court refused to make an *interim* appointment during the running of the *inducice* on the ground that the respondent might have a good answer to an *interim* appointment being made.[10]

The Court will make an *interim* appointment where the matter is urgent,[11] and when such an appointment is made the reading in the Minute Book is dispensed with and immediate extract ordered.[12]

(*k*) *Where no Answers are Lodged.*—If, on the expiry of the *inducice* no answers have been lodged, the petition along with the requisite executions, acceptances, and certificates is lodged and enrolled in the

[1] *Lockhart, &c., Petitioners*, 1837, 15 S. 498; *Rollo, &c., Petitioners*, 1852, 14 D. 990.

[2] *Watson* v *Crawcour*, 1856, 19 D. 70.

[3] *Forbes* v *Dalziel*, 1877, 5 R. 328; *Grant, Petitioner*, 1901, 9 S.L.T. 138.

[4] *Hope* v *Hamilton*, 1851, 13 D. 1268; *Scott, Petitioner*, 1855, 17 D. 932.

[5] *Morrison, &c., Petitioners*, 1882, 19 S.L.R. 442; *Thomson & Co., Petitioners*, 1882, 19 S.L.R. 738.

[6] *Kirk, &c., Petitioners*, 1827, 5 S. 564 (N.E. 530); *Davidson, &c., Petitioners*, 1830, 8 S. 1027; *Henderson, Petitioner*, 1830, 8 S. 1027; *Philp, Petitioner*, 1831, 10 S. 192; *Lyall, Petitioner*, 1843, 5 D. 1428.

[7] *Taylor* v. *Taylor's Trustees*, 1857, 19 D. 1097, at pp. 1098-9.

[8] *Brown, &c., Petitioners*, 1848, 11 D. 1027; *Goold, &c., Petitioners*, 1856, 18 D. 1318.

[9] *Sharp* v *M'Call*, 1860, 23 D. 38, per L.J.C. Inglis, p. 40.

[10] *Armit, &c., Petitioners*, 1844, 16 Jur. 439.

[11] *A B, Petitioner*, 1829, 8 S. 89; *Wilson, &c., Petitioners*, 1849, 12 D. 248; *Young* v *Collins*, 1852, 14 D. 746; *Goold, &c., Petitioners*, 1856, 18 D. 1318.

[12] Antonio, p. 139, sec. 7.

Motion Roll of the Bill Chamber, when the prayer of the petition will be granted or otherwise dealt with.

(*l*) *Answers.*—Where a respondent is at issue with the petitioner regarding the statements made in the petition, or in the prayer, it is the practice to lodge formal answers, which should be printed and boxed and signed by counsel.[1] Answers should be intimated to the petitioner's agent along with six copies of the petition. Answers are in the form of defences in an ordinary action, only there are no pleas-in-law.

Where the respondent is not at issue with the petitioner on fact but only in law he may lodge a minute to that effect.

(*m*) *Compearer.*—Where a person upon whom the petition has not been served desires to appear in the process, he may lodge and box answers in the same way as if he had been called in the petition, and when the answers appear in the Motion Roll he may move that the answers be allowed to be received. A compearer may also lodge a minute asking to be allowed to lodge answers. The petitioner may resist either motion, but if the compearer can qualify any reasonable interest his answers will be received.[2]

(*n*) *Proof.*—In cases where an alleged *incapax* lodges answers denying his incapacity, the method of arriving at the facts is in the discretion of the Court, and the respondent has no right to demand a cognition or proof with sworn evidence.[3] Accordingly, the Court may proceed on the certificates of the petitioner's medical men,[3] or on the certificates of the respondent's medical men, if their examination has been later in date than that of the petitioner's medical men.[4] If the Court is in doubt it may remit to an independent medical expert,[5] and on a con-

[1] *Denny* v *Macnish*, 1863, 1 M. 268; C.A.S., A. III. 14.

[2] *Gas Power and By-Products Co., Ltd.* v *Power Gas Corporation, Ltd.*, 1911 S.C. 27.

[3] *C B* v *A B*, 1891, 18 R. (H.L.) 40.

[4] *Macfarlane, &c., Petitioners*, 1846, 9 D. 306.

[5] *Fraser, Petitioner*, 1901, 9 S.L.T. 271.

sideration of the whole series of reports decide the case.[1] In some cases a proof has been allowed.[2]

In cases of removal of trustees a proof may be allowed where the allegations are denied.[3] Where answers are not lodged affidavits have been insisted upon.[4]

In a petition where a partner of a firm asked for the appointment of a judicial factor to take over the management of a partnership on the ground that the other partner made it impossible to carry on the copartnership business and answers were lodged denying the petitioner's statements, parties were allowed a proof of their averments.[5]

(*o*) *Caution.*—When an appointment is made the judicial factor must, within such time as the Court shall direct, find caution for his duly accounting for his intromissions and management, and observing and performing every duty incumbent upon him as factor in terms of the rules prescribed for the discharge of his office, and in case of his failure to do so his appointment shall fail.[6] No factor shall enter on his duties nor shall an extract of his appointment be issued until he has found caution; and the factor shall extract his appointment without delay.[6]

When not otherwise expressed in the interlocutor appointing a judicial factor the time for finding caution is limited to one calendar month from the date of the interlocutor; but on cause shown by application at any time before the expiry of that period the Court may prorogate the time for finding caution.[7] A bond of caution has been received after the lapse of a month on an application for that purpose being made.[8]

[1] *C B* v *A B*, 1891, 18 R. (H.L.) 40.

[2] *Taylor* v *Macfarlane*, 1847, 10 D. 38; *Yule* v *Yule*, 1881, 19 S.L.R. 140.

[3] *M'Whirter* v *Latta*, 1889, 17 R. 68.

[4] *Dickson's Trustees, Petitioners*, 1894, 2 S.L.T. 61; *Wishart, &c., Petitioners*, 1910, 2 S.L.T. 229.

[5] *Booth* v *Mackinnon*, 1908, 15 S.L.T. 848.

[6] 12 & 13 Vict. cap. 51, sec. 2.

[7] C.A.S., G. I. 3; *Harris, Petitioner*, 1901, 8 S.L.T. 415; *Cuthbertson, &c., Petitioners*, 1905, 13 S.L.T. 205.

[8] *Campbell, &c., Petitioners*, 1855, 18 D. 292.

The Court may limit the caution to be found.[1]

The bond of caution is prepared by the agent,[2] and the Accountant of Court is the person to whom bonds of caution for judicial factors must be delivered, section 102 of the Court of Session Act, 1868, being repealed for that purpose.[3]

On a judicial factor being appointed subject to caution being found, the process must forthwith be transmitted to the Accountant of Court in order that the matter of caution may be dealt with; and

(i.) The Accountant of Court shall, on the bond of caution being delivered to him, and on being satisfied as to its form and due execution, and as to the sufficiency of the cautioner, make a marking on the margin of the interlocutor sheet to the effect that caution has been received, adding his signature and the date; and such marking shall be an authority for extract of the appointment;

(ii.) Where it is proposed that the caution be limited by the Court, as authorised by section 27 of the Judicial Factors Act, 1849, whether in the case of a private cautioner or of a public company, the Accountant of Court shall, after such inquiry as he thinks requisite, report on the proposed limitation to the Lord Ordinary, who may approve of or vary the limitation proposed, and that without enrolment or motion unless any party having interest shall have intimated to the clerk of the process that he desires to be heard;

(iii.) During the subsistence of a factory the Accountant may, with the approval of the Lord Ordinary, which may be obtained without enrolment or motion, call upon the factor to increase the amount of the existing cautionry bond, or to find new or additional caution, or to procure a company bond in substitution for or in addition to that of an existing cautioner, and the Accountant may, with

[1] 12 & 13 Vict. cap. 51, sec. 27; *M'Kinnon, Petitioner*, 1884, 11 R. 676. See also *Hagart, &c., Petitioners*, 1893, 1 S.L.T. 62.

[2] Antonio, p. 139, sec. 11.

[3] C.A.S., G. I. 4; 56 & 57 Vict. cap. 14.

the like approval, authorise the factor to decrease the amount of the existing caution;

(iv.) The Accountant shall, in January yearly, prepare and submit a list of approved guarantee companies for the consideration and approval of the Lord Ordinary.[1]

An unmarried woman may be a cautioner,[2] and so may an insurance company.[3]

After the Accountant has approved of the caution, whether limited or unlimited, he, on the expiry of eight days from the date of the appointment, will call on the agent for the petitioner to transmit the process to the Extractor, retaining the bond of caution in his own custody.[4]

When the process is transmitted to the Extractor for extract, the agent should see, on getting up his extract from the Extractor, that the process is re-transmitted to the Bill Chamber. The process is a continuing one and subsists until the Judicial Factor has been discharged.[5]

The Accountant of Court shall allow as a charge against the factory estate—(1) the premium paid by the factor where a company bond of caution has been accepted, or such part thereof as he deems proper, and (2) the expense of the necessary procedure in obtaining the approval of a bond of caution or the limitation, increase, or reduction of the amount; but the fact of such charge shall be taken into account by the Accountant of Court in fixing the factor's remuneration.[6]

(*p*) *Transmission of Processes.*

(i.) *To Accountant.*—The Clerks of Court are authorised and directed to transmit to the Accountant at all times on his requisition the proceedings, or such part thereof as he may require, in all processes of judicial factory or other processes relative thereto

[1] C.A.S., G. I. 5; 20 & 21 Vict. cap. 71, sec. 84.

[2] *Fraser's Judicial Factor, Petitioner*, 1892, 19 R. 500.

[3] *M'Kinnon, Petitioner*, 1884, 11 R. 676; 12 R. 184; *Harley, Petitioner*, 1888, 25 S.L.R. 445; 12 & 13 Vict. cap. 51, sec. 27; Antonio, p. 140, sec. 14.

[4] Antonio, p. 140, sec. 18.

[5] Antonio, p. 140, sec. 19.

[6] C.A.S., G. I. 6.

depending in the Court, in so far as such proceedings may not at the time be required for the use of the Court.[1]

(ii.) *Transmission of Inner House Process to Junior Lord Ordinary.*—Where any incidental petition or Note in a judicial factory is presented to the Junior Lord Ordinary in cases where the appointment of the Judicial Factor has been made by either Division of the Court, and the original proceedings have remained in the office of the Clerk of such Division, the latter is hereby authorised and directed to transmit the said original proceedings to the Clerk of the Junior Lord Ordinary; and the last-mentioned Clerk is hereby authorised and directed to transmit of new, when required, the whole proceedings to the Clerk of such Division.[2]

(*q*) *Falling Asleep.*—These petitions being originally Inner House petitions do not fall asleep.[3]

(4) *Special Powers.*

(*a*) *Jurisdiction.*—The Court of Session has always had the right of supplementing the common law powers of legal guardians and judicial factors by granting extraordinary or special powers.[4] Formerly the right was exercised by the Inner House, but now it is exercised by the Junior Lord Ordinary.[5] In vacation, the Lord Ordinary on the Bills has the same power as the Junior Lord Ordinary in session.[6]

(*b*) *Form of Application.*—Where a Judicial Factor is of opinion that there is a strong expediency

(1) for granting abatement of rent, either temporarily or permanently; or

(2) for renewing or granting a lease for a period of years;[7] or

[1] C.A.S., G. I. 2.
[2] C.A.S., G. I. 7.
[3] *Wemyss, Petitioner*, 1860, 22 D. 556.
[4] *Somerville's Factor, Petitioner*, 1836, 14 S. 451.
[5] 12 & 13 Vict. cap. 51, secs. 1, 7, 25; 20 & 21 Vict. cap. 56, sec. 4; 49 & 50 Vict. cap. 27, sec. 12; *Dow, Petitioner*, 1910, S.C. 273.
[6] 52 & 53 Vict. cap. 54, sec. 3.
[7] This is now unnecessary as regards leases of agricultural lands for a period not exceeding 21 years and mineral leases not exceeding 31 years. 30 & 31 Vict. cap. 97, sec. 2; 47 & 48 Vict. cap. 63, sec. 2; 52 & 53 Vict. cap. 39, sec. 19; *Molleson, Petitioner*, 1890, 17 R. 303.

(3) for draining; or
(4) for erecting buildings or fences; or
(5) for otherwise improving the estate in a manner not coming within the ordinary course of factorial management; or
(6) for the purchase of annuities for wards,

he shall report the same to the Accountant of Court, who may order any necessary inquiry, and shall state his opinion thereon in writing; and such report and opinion may be submitted by the factor with a Note praying for the sanction of the Court to the measure proposed.[1] It is imperative to have an opinion from the Accountant of Court,[2] although in practice this is not always insisted in prior to the presentation of the Note.

Whether it is imperative to proceed by way of a Note in the cases above enumerated has not been definitely decided, but it would rather appear from the report of one case that the Court was of that opinion.[3] It was decided, however, in the case referred to that as regards applications in cases other than those specially enumerated in section 7 of the Judicial Factors Act of 1849, the applicant may adopt procedure either by way of Note or by Petition.[4]

By Act of Sederunt, 25th November, 1857,[5] regulating the procedure of Judicial Factors appointed under section 164 of the Bankruptcy (Scotland) Act, 1856, it was enacted that where such a Judicial Factor desired special powers he should submit the proposal by Note to the Accountant, whose duty it was to report thereon in writing, and thereafter the report with the application was submitted to the Court. The Bankruptcy (Scotland) Act, 1856, has been repealed by the Bankruptcy (Scotland) Act, 1913, and the Act of Sederunt, 25th November, 1857,

[1] 12 & 13 Vict. cap. 51, sec. 7.
[2] *Gillespie's Factor, Petitioner*, 1902, 9 S.L.T. 421.
[3] *Mackenzie, Petitioner*, 1862, 24 D. 844.
[4] *Mackenzie, Petitioner*, 1862, 24 D. 844.
[5] Section 14.

accordingly falls. Section 163 of the Bankruptcy Act of 1913 takes the place of section 164 of the prior Act, but section 14 of the Act of Sederunt, 25th November, 1857, has been omitted from the Codifying Act of Sederunt.

It is competent for a Judicial Factor to ask for authority to make up title under section 24 of the Titles to Land Consolidation (Scotland) Act, 1868,[1] as amended by section 3 of the Titles to Land Consolidation (Scotland) Amendment Act, 1869,[2] either by Note or Petition.

The present practice seems to make no distinction between procedure by Note and by Petition. An original application is always by Petition, but subsequent applications incidental to the original petition may be in the form either of a Note, with or without a prior report to the Accountant of Court and the latter's opinion thereon, or of a Petition. In any event they are treated as incidental applications and the dues are levied accordingly. It is usual, however, to have a *Petition* for discharge.

(*c*) *At what Stage Given.*—In ordinary circumstances the proper person to make application for special powers is the Judicial Factor himself.[3] Accordingly, special powers are not granted at the same time as the appointment is made, except in the case where a petitioner craves for the appointment of a Judicial Factor with special power to make up title under section 44 of the Conveyancing Act, 1874, or where a factor, upon whom special powers have been conferred by the Court, dies without exercising them, and a new appointment is asked for with the same powers.[4]

Although special powers are not, except in the above-mentioned cases, conferred at the time of appointment, this does not prevent a crave for special

[1] 31 & 32 Vict. cap. 101.
[2] 32 & 33 Vict. cap. 116.
[3] *Russell, &c., Petitioners*, 1874, 2 R. 93; *Perry, Petitioner*, 1903, 10 S.L.T. 536, per Lord Pearson.
[4] *Raeburn, &c., Petitioners*, 1851, 13 D. 951.

powers being made in the petition for appointment.[1] The powers are never given, however, until the appointment has been made and caution found, and until the factor appointed has practically adopted the crave and the petition has been remitted to the Accountant of Court.[2]

Application for authority to complete the title of a Judicial Factor to any trust property under the 38th section of the Titles to Land (Scotland) Act, 1860, may be contained in the petition for the appointment of such factor,[3] but such authority is not given until the Judicial Factor has found caution.

The Court has granted special powers after they have been exercised without authority, but this is unusual.[4]

(*d*) *Enumeration of Special Powers Granted, Refused, &c.*— The Court has *granted* the following special powers:—

To fix or increase aliment to the ward,[5] or his wife and family;[6]

To aliment the mother of a bastard *incapax*;[7]

To continue aliment to ward's indigent relative,[8] or next of kin;[9]

To sell heritage;[10]

To purchase heritage;[11]

To terminate ward's contract of co-partnership;[12]

To borrow on security of ward's estate to pay debts;[13]

To call up bonds which were originally the proceeds of the sale of heritage, to purchase other heritage, and to borrow on the security of said heritage;[14]

[1] *Youngs, Petitioners*, 1905, 43 S.L.R. 648.

[2] *Ibid.*

[3] Trusts (Scotland) Act, 1867, sec. 15.

[4] *Hodge, Petitioner*, 1904, 11 S.L.T. 709.

[5] *Currie, Petitioner*, 1904, 12 S.L.T. 30.

[6] *Russell, Petitioner*, 1850, 12 D. 913; *A* v *B*, 1858, 20 D. 778; *Blackwood, Petitioner*, 1890, 17 R. 1093.

[7] *A B, Petitioner*, 1894, 2 S.L.T. 311.

[8] *Gardner, Petitioner*, 1882, 20 S.L.R. 165.

[9] *Balfour, Petitioner*, 1889, 26 S.L.R. 268.

[10] *Hodge, Petitioner*, 1904, 11 S.L.T. 709; *Youngs, Petitioners*, 1905, 43 S.L.R. 648: *Gilligan's Curator*, 1907, 15 S.L.T. 1042.

[11] *Gilray, Petitioner*, 1876, 3 R. 619. See also *Watt, Petitioner*, 1856, 18 D. 652.

[12] *Currie, Petitioner*, 1904, 12 S.L.T. 30.

[13] *Tweedie, Petitioner*, 1841, 3 D. 369; *Stewart* v *Kirkaldy*, 1849, 12 D. 73.

[14] *Brodie, Petitioner*, 1907, 15 S.L.T. 17.

To make up titles to heritable estate ;[1]
To retain speculative shares ;[2]
To elect between testamentary and legal rights ;[3]
To charge debt ;[4]
To approve of investments ;[5]
To abate rent ;[6]
To resign trusts held by ward ;[7]
To subscribe to charitable objects ;[8]
To renounce leases ;[9]
To accept the renunciation of leases ;[10]
To sub-lease ;[11]
To insure ward's life in order to raise money ;[12]
To exhume body and to re-inter ;[13]
To purchase an annuity for a life-renter ;[14]
To search for, recover, and take possession of papers of superseded trustees, including opening shut and lockfast places ;[15]
To cut wood on ward's estate ;[16]
To accept personal security for an annuity upon the ward ;[17]
To transfer foreign stock ;[18]
To pay heritable debt out of movable estate in order to protect the heritage ;[19]
To consent to the sale of the heritable subjects of a liferent ;[20]

[1] *Grant, Petitioner*, 1844, 17 Jur. 88 ; *M'Donald, Petitioner*, 1845, 17 Jur. 539 ; *MacKay, Petitioner*, 1848, 10 D. 1493 ; *Boyd, Petitioner*, 1855, 17 D. 1115.

[2] *Browning's Factor, Petitioner*, 1905, 7 F. 1037.

[3] *Skinner's Curator Bonis, Petitioner*, 1903, 5 F. 914.

[4] *Moncreiff, Petitioner*, 1894, 1 S.L.T. 528.

[5] *Grainger's Curator, Compearer*, 1876, 3 R. 479 ; *Lloyd's Curator, Compearer*, 1877, 5 R. 289 ; *Accountant of Court* v *Crumpton's Curator*, 1886, 14 R. 55.

[6] *Grant's Curator, Petitioner*, 1880, 7 R. 1014.

[7] *Laidlaw, Petitioner*, 1882, 10 R. 130.

[8] *Currie, Petitioner*, 1904, 12 S.L.T. 30.

[9] *Robertson, Petitioner*, 1841, 3 D. 345 ; *Turner, &c., Petitioners*, 1862, 24 D. 694.

[10] *Wink, Petitioner*, 1851, 13 D. 952.

[11] *Slade or H mmond, Petitioner*, 1831, 10 S. 167.

[12] *Earl of Buchan, &c., Petitioners*, 1839, 1 D. 637.

[13] *Kilpatrick, Petitioner*, 1881, 8 R. 592.

[14] *Simson, &c., Petitioners*, 1883, 10 R. 540.

[15] *M'Alley's Judicial Factor, Petitioner*, 1900, 2 F. 1198.

[16] *Forrest's Curator Bonis, Petitioner*, 1901, 9 S.L.T, 216 ; *cf. Macqueen* v *Tod*, 1899, 1 F. 1069.

[17] *Saunders, Petitioner*, 1882, 19 S.L.R. 544.

[18] *Morison, Petitioner*, 1901, 4 F. 144 ; *M'Call's Curator, Petitioner*, 1901, 8 S.L.T. 440.

[19] *Macbean's Curator Bonis, Petitioner*, 1890, 28 S.L.R. 8.

[20] *Cowan's Curator Bonis, Petitioner*, 1902, 5 F. 19.

To exercise discretionary powers conferred on trustees;[1]

To a Judicial Factor appointed under the Railway Companies Act, 1867, to apply to Parliament for an Act to enable him to sell the railway undertaking;[2]

To assign the ward's interest in a partnership to a new limited Company and to accept fully paid-up stock of the new Company in lieu of the ward's interest in the existing partnership.[3]

The Court has held that petitions for the following powers are *unnecessary*:—

To pay aliment to ward's brother;[4]

To discharge a bond;[5]

To compromise claims;[6]

To grant agricultural leases for a period not exceeding 21 years;[7]

To pay debt properly incurred by superseded trustees;[8]

To make extensive repairs;[9]

To sell heritage (by curator of minors);[10]

To grant urban leases;[11]

To take suitable English investments in his (*curator bonis*) own name.[12]

The Court has *refused* to allow a Judicial Factor to carry on a business for the benefit of the ward;[13] and has held it to be incompetent to grant special powers which vary or contradict the terms of a trust deed.[14]

(*e*) *Review.*—By section 7 of the Judicial Factors Act, 1849,[15]

[1] *Brown, Petitioner*, 1910, 1 S.L.T. 29.

[2] *Haldane* v *Rushton*, 1881, 9 R. 253; *Haldane* v *Neilson*, 1882, 9 R. 854.

[3] *Bontine's Curator Bonis, Petitioner*, 1870, 8 M. 976.

[4] *Dunbar, Petitioner*, 1876, 3 R. 554.

[5] *Wills, Petitioner*, 1879, 6 R. 1096; *Keith's Curator, Petitioner*, 1893, 30 S.L.R. 621.

[6] *Scott* v *Craig's Representatives*, 1897, 24 R. 462.

[7] *Pringle Pattison's Curator Bonis, Petitioner*, 1890, 17 R. 303.

[8] *Brown's Factor, Petitioner*, 1902, 9 S.L.T. 490.

[9] *Molleson, Petitioner*, 1895, 3 S.L.T. 110.

[10] *Gillam's Curator, Petitioner*, 1908, 15 S.L.T. 1043.

[11] *Steele* (*Tosh's Factor*), *Petitioner*, 1912, 50 S.L.R. 148. See also *Proctor* v *Gordon*, 1824, 2 S. 659 (N.E. 553); *Smith* v *Smith*, 1862, 24 D. 838, per Lord Deas, 843; *Noble's Trustees, Petitioners*, 1912, S.C. 1230.

[12] *Accountant of Court* v *Crumpton's Curator Bonis*, 1886, 14 R. 55; *Brodie* v *London & North-Western Railway Co.*, 1912, 2 S.L.T. 447.

[13] *Accountant of Court* v *Robertson*, 1872, 10 M. 715.

[14] *Bowers* v *Pringle Pattison's Curator*, 1892, 19 R. 941; *Wood, Petitioner*, 1896, 3 S.L.T. 277.

[15] 12 & 13 Vict. cap. 51.

the procedure is laid down that the Lord Ordinary, when a Note for special powers is presented to him, shall, with or without further inquiry, report the matter to the Court whose decision is final and not subject to appeal. The Distribution of Business Act, 1857, however, now regulates the procedure, and the Lord Ordinary has full power to decide on and dispose of such petitions, and in special causes, if he see cause, report such petition or application to the Court, who may dispose of the same or give instructions thereanent.[1] It is not competent to bring under review of the Court any interlocutor pronounced by the Lord Ordinary upon such petition, application, or report with a view to investigation and inquiry merely, and which does not finally dispose thereof *upon the merits;* but any judgment pronounced by the Lord Ordinary on the merits, unless where the same has been pronounced in terms of instructions of the Court on report as above mentioned, may be reclaimed against by any party having lawful interest to reclaim to the Court, provided that a reclaiming note shall be boxed *within 8 days*, after which the judgment of the Lord Ordinary, if not so reclaimed against, is final.[2]

(*f*) *Procedure.*—The application for special powers is by Petition or by Note to the Junior Lord Ordinary (See *Jurisdiction, supra*, p. 108; Form of Application, *supra*, p. 108).

Where procedure is by Note, the petitioner should first report to the Accountant of Court,[3] and the report and the Accountant's opinion thereon are printed as an appendix to the Note. This rule has been relaxed in practice, and now notes may follow the same procedure as petitions.

The Petition or Note sets forth the circumstances in which the special powers are required. The name and date of the original petition should be stated.[4] The prayer of the Petition or Note is for intimation

[1] 20 & 21 Vict. cap. 56, sec. 5.
[2] *Ibid.*, sec. 6.
[3] *Gillespie's Factor, Petitioner*, 1902, 9 S.L.T. 421.
[4] *Scott, Petitioner*, 1856, 18 D. 323.

on the walls and in the Minute Book, and service on the parties named in the original petition for appointment, and upon the cautioner,[1] and craves the Lord Ordinary in clear and specific terms to give the power or powers desired.[2] The Petition or Note is printed, boxed, and lodged in the usual way, and after appearing in the Motion Roll the usual first order is taken.

Where the procedure is by Note, and the Accountant of Court has been previously consulted, and has given a favourable opinion, the Lord Ordinary will grant the prayer after the expiry of the *inducicæ*, if no opposition is made. If there is opposition, the Lord Ordinary may take further advice, by remit or otherwise,[3] before giving his decision.

Where the procedure is by Petition the Lord Ordinary always remits to the Accountant of Court, except in the case of a petition to make up title, where that is unnecessary. When he remits to the Accountant, it is not necessary that the Lord Ordinary should follow his advice, and accordingly the Lord Ordinary has both granted [4] and refused [5] special powers contrary to the opinion of the Accountant of Court.

For *Printing and Boxing, Lodging, Intimation, Inducicæ, Service, Amendment, &c.*, see *supra*, p. 99, *et seq.*

(5) *Termination.*

(*a*) *Jurisdiction.*—In all petitions relative to the termination of an appointment or of a factory, the Junior Lord Ordinary has jurisdiction. Thus, where a petition is presented for recall of an appointment or of a factory;[6] for exoneration and discharge;[7] for the delivery of a bond of caution;[8] and for removal

[1] *Grant, Petitioner*, 1844, 17 Jur. 88; *Rutherfurd, Petitioner*, 1845, 17 Jur. 152.

[2] *Romanes, Petitioner*, 1860, 22 D. 627.

[3] 20 & 21 Vict. cap. 56, sec. 5.

[4] *Youngs, Petitioners*, 1905, 43 S.L.R. 648.

[5] *Gilligan's Factor, Petitioner*, 1898, 25 R. 876.

[6] *Souter* v *Finlay*, 1890, 18 R. 86. See also *Masterton* v *Erskine's Trustees*, 1887, 14 R. 712; *Craig* v *Accountant of Court*, 1907, 15 S.L.T. 645.

[7] 20 & 21 Vict. cap. 56, sec. 4 (4).

[8] *Aitken, Petitioner*, 1893, 21 R. 62. See also *Aiton's Factor, Petitioner*, 1875, 13 S.L.R. 175; *cf. Nicol's Curator, Petitioner*, 1884, 11 R. 867; *Cowan, Petitioner*, 1901, 9 S.L.T. 93.

of a factor,[1] it has been held that the petition is competently presented to the Junior Lord Ordinary. Where the appointment has been made by either Division of the Inner House and the original proceedings have remained in the office of the clerk to such Division, the latter is authorised to transmit the original proceedings to the Clerk of the Junior Lord Ordinary.[2] Where the appointment is made by any Lord Ordinary, as in the case of the Trusts Acts,[3] it is now the practice, whenever the appointment has been made, to transmit the proceedings to the Junior Lord Ordinary, before whom all subsequent steps in the petition are made.

Petitions for discharge in factories or curatories not falling under the Judicial Factors Acts are presented to the Inner House in session,[4] and to the Lord Ordinary on the Bills in vacation.[5] Petitions presented in session are usually remitted by the Inner House to the Junior Lord Ordinary to report as to the sufficiency of the discharge.[6]

Petitions for the recall of appointments made in the Sheriff Court in terms of the Judicial Factors Act, 1880, may be presented to the Junior Lord Ordinary.[7]

(*b*) *Procedure.*

(i) *Recall of Factory.*—Where the termination of judicial management, as distinguished from the termination of a particular judicial factor's appointment, is desired, the procedure is by a petition for recall of the factory. The petition should set forth the grounds for recall, such as that the minor has attained majority,[8] or that the *incapax* has recovered,[9] or was never incapable.[10] In each case

[1] *Marshall* v *Chisholm*, 1901, 3 F. 642. See also *Forrest* v *Forrest's Judicial Factor*, 1898, 6 S.L.T. 68.

[2] C.A.S., G. I. 7.

[3] Trusts (Scotland) Act, 1867, secs. 10 and 16.

[4] *Murray, Petitioner*, 1873, 1 R. 45; *Nicol's Curator, Petitioner*, 1884, 11 R. 867.

[5] *Aitken, Petitioner*, 1893, 21 R. 62.

[6] *Murray, Petitioner*, 1873, 1 R. 45; *Cowan, Petitioner*, 1901, 9 S.L.T. 93.

[7] Judicial Factors Act, 1889, sec. 14. See also *Forrest* v *Forrest's Judicial Factor*, 1898, 6 S.L.T. 68.

[8] *Walker, Petitioner*, 1843, 5 D. 422.

[9] *Forster, Petitioner*, 1848, 11 D. 1031; *Davie, Petitioner*, 1849, 11 D. 1495.

[10] *Forsyth, Petitioner*, 1862, 24 D. 1435; *Lawson, &c., Petitioners*, 1863, 2 M. 355.

certificates should be produced. The prayer is for intimation and service on eight days' *inducice* to all concerned, including cautioner, and upon resuming consideration, with or without answers, to recall the factory and to remit to the Accountant of Court to examine and report upon the factor's accounts; and on consideration of the report to exoner and discharge the factor of his actings, and to grant warrant to the Accountant of Court to deliver up the bond of caution, and to decern, with expenses out of the estate.

The first order is for intimation and service. On the expiry of the *inducice* the petition is enrolled, and his Lordship is asked to recall the factory and to remit to the Accountant. On the latter's report being lodged a motion is made to discharge the factor and to grant warrant for delivery of the bond of caution.

Where in a petition for recall of a curatory, certificates of two medical men were produced that the ward was of sound mind, and objections thereto were lodged, the Lord Ordinary remitted to one of the Commissioners in Lunacy to examine and report.[1]

There can be no discharge unless the factor submits his accounts to the Accountant of Court.[2]

For *Printing and Boxing, Lodging, Intimation, Inducice, Service, Amendment, &c.*, see *supra*, p. 99, *et seq.*

(ii.) *Recall of Appointment.*—Where what is desired is not the termination of judicial management itself, but the termination of the particular factor's management, the petition is similar to the petition of recall of factory, with this distinctive difference that the prayer is not for recall of the factory but for recall of the appointment of the factor and the appointment of a successor. A reasonable excuse must be given for the recall of the appointment,[3]

[1] *Fraser, Petitioner*, 1901, 9 S.L.T. 271.
[2] *Craig* v *Accountant of Court*, 1907, 15 S.L.T. 645.
[3] *M'Ewan, Petitioner*, 1857, 19 D. 936, per Lord Ivory, 937.

such as that the factor has gone abroad *animo remanendi*;[1] is bankrupt;[2] failure to cite the proper parties in the petition asking for the appointment;[3] or any other ground not inferring delict.[4]

A crave for decree against the executors of the ward for payment of a balance due to the petitioner is incompetent.[5]

In recalling the appointment the Court is guided by the interests of the person whose property has been placed in the hands of the Court in the special circumstances of the case.[6]

(iii.) *Exoneration and Discharge.*—Where a factory has come to a termination by mere lapse of time, as where a minor has attained majority,[7] the crave for recall of the factory may be dispensed with, and only exoneration and discharge and delivery of the bond of caution asked for. In other respects the petition is similar to the petition for recall of a factory.

In a petition for creditors, the Lord Ordinary ordered intimation of a petition for exoneration and discharge to the creditors by circular.[8]

There can be no judicial discharge without a judicial audit of the factor's accounts.[9]

In a petition for appointment of a new judicial factor upon the death of the previous factor, there should be a crave for the discharge of the late factor.[10]

An *interim* decree of exoneration and discharge has been granted in special circumstances.[11]

It is incompetent to insert a crave against the

[1] *Bell, Petitioner*, 1834, 12 S. 531; *Kyle, Petitioner*, 1862, 24 D. 1083.
[2] *Fraser, &c., Petitioners*, 1849, 11 D. 1028; *Forsyth*, 1853, 15 D. 708.
[3] *Lawson, &c., Petitioners*, 1894, 2 S.L.T. 308.
[4] *Fisher* v *Tod*, 1865, 3 M. 889, per L.J.C. Inglis, p. 890; *Sawyer* v *Sloan*, 1875, 3 R. 271.
[5] *Mackie, Petitioner*, 1910, 1 S.L.T. 167.
[6] *Balfour Melville, Petitioner*, 1903, 5 F. 347.
[7] *Edmond, Petitioner*, 1853, 15 D. 521.
[8] *Roxburgh, Petitioner*, 1901, 8 S.L.T. 415.
[9] *Aiton's Factor, Petitioner*, 1875, 13 S.L.R. 175. See also *White, &c., Petitioners*, 1860, 22 D. 1473.
[10] *Dalziel, Petitioner*, 1898, 5 S.L.T. 255.
[11] *Smith, Petitioner*, 1882, 19 S.L.R. 435.

executors of a deceased ward for payment of a balance due to the petitioner.[1]

(iv.) *Delivery of Bond of Caution.*—Where there has been an extra-judicial discharge given to the factor, the latter may confine his petition to a crave for delivery of his bond of caution. The only point in this petition is with regard to judicial audit of the factor's accounts.

In petitions not falling under the Judicial Factors Act, 1849, it was the practice, prior to the year 1889, for the Court to dispense with an order for a judicial audit and *de plano* to grant warrant for delivery of the bond of caution.[2] Since the passing of the Judicial Factors Act, 1889, all factories alike are subject to the supervision of the Accountant of Court, and the Court will not order delivery of a bond of caution without first making a remit to the Accountant to examine the accounts, and it is in the Accountant's discretion to say whether or not a full audit may be dispensed with.[3]

(v.) *Removal.*—Where a factor has been guilty of delict the petition must be for removal and not for recall.[4] Removal may be asked for either by simple petition,[5] or by petition and complaint,[6] depending upon the nature of the delict. Where the procedure is by simple petition it is presented to the Junior Lord Ordinary;[7] where by petition and complaint to the Inner House.

Judicial Factors appointed under section 163 of the Bankruptcy (Scotland) Act, 1913, seem to be subject to the same rules.[8]

[1] *Mackie* (*Wallace's Curator Bonis*), *Petitioner*, 1910, 1 S.L.T. 167.

[2] *Rollo, Petitioners*, 1852, 14 D. 990; *Mackay, &c., Petitioners*, 1857, 19 D. 503; *Nicol's Curator, Petitioner*, 1884, 11 R. 867; *Aitken, Petitioner*, 1893, 21 R. 62, per Lord Adam, p. 63. See also *Aiton's Factor, Petitioner*, 1875, 13 S.L.R. 175.

[3] *Aitken, Petitioner*, 1893, 21 R. 62; *Cowan, Petitioner*, 1901, 9 S.L.T. 93.

[4] *Fisher* v *Tod*, 1865, 3 M. 889.

[5] *Stewart* v *M'Given*, 1852, 24 Jur. 233; *Marshall* v *Chisholm*, 1901, 3 F. 642. See also *Accountant of Court* v *Jaffray*, 1851, 14 D. 292; *Accountant of Court* v *M'Allister*, 1853, 16 D. 301; *Macdonald* v *Macdonald*, 1854, 16 D. 1023; *Accountant of Court* v *Wilkie*, 1856, 18 D. 793; *Lowe, Petitioners*, 1872, 11 M. 17; *Walker* v *Buchanan*, 1888, 15 R. 1102.

[6] Judicial Factors Act, 1849, sec. 21; *Mackenzie* v *Gibson*, 1845, 7 D. 560.

[7] 20 & 21 Vict. cap. 56, sec. 4 (5); 52 & 53 Vict. cap. 39, sec. 14.

[8] *Masterton* v *Erskine's Trustees*, 1887, 14 R. 712.

(6) *Reclaiming Notes.*—Reclaiming notes are only allowed against interlocutors on the merits,[1] and cannot bring up for review prior interlocutors on the merits which have become final.[2] Interlocutors not upon the merits can only be brought to the notice of the Inner House by a report of the Lord Ordinary. It is not necessary that an interlocutor, in order to be an interlocutor on the merits, should exhaust the merits of the Petition. Thus where in a Petition for discharge of a *curator bonis* the Lord Ordinary pronounced an interlocutor finding that certain sums charged in the curator's account were not proper charges against the curatory, and of new remitting to the Accountant of Court to give effect to these findings and to adjust the balance due by the *curator bonis* and to report, the interlocutor was held to be an interlocutor on the merits and could be reclaimed against.[3]

It is competent to reclaim against an interlocutor making an appointment in absence, but the reclaiming note should not be in the form of a reponing note but of a reclaiming note against an interlocutor on the merits praying to have the appointment recalled.[4]

Where a judgment on the merits has been pronounced during session a reclaiming note must be boxed within 8 days of the date of the interlocutor reclaimed against, after which the judgment of the Lord Ordinary, if not reclaimed against, is final.[5] Where Petitions appropriate to the Junior Lord Ordinary during session are dealt with and disposed of in vacation, the interlocutor disposing of the Petition must be reclaimed against within 8 days.[6]

Where the days allowed for presenting a reclaiming note against an interlocutor expire during any vacation, recess, or adjournment of the Court, such reclaiming note may be presented on the first box day occurring in said vacation, recess, or adjournment after the reclaiming days have expired; and if there be no such box day, then on the first ensuing sederunt day.[7]

Where a Petition has been heard during session, but the

[1] 20 & 21 Vict. cap. 56, sec. 6; *M'Nab* v *M'Nab*, 1871, 10 M. 248. See also *Wallace* v *Whitelaw*, 1900, 2 F. 675.

[2] *Marquis of Queensberry's Trustees* v *Douglas*, 1907, S.C. 924.

[3] *Clark* v *Barr's Trustees*, 1903, 5 F. 856. See also *Macqueen* v *Tod*, 1899, 1 F. 859.

[4] *Sharp* v *M'Call*, 1860, 23 D. 38.

[5] 20 & 21 Vict. cap. 56, sec. 6.

[6] *Staig* v *Johnston*, 1875, 2 R. 701.

[7] C.A.S., D. I. 4; A.S., 14th March, 1894; *Bain* v *Allan*, 1884, 11 R. 650.

interlocutor deciding the merits has been signed in vacation, such interlocutor, if dated at or prior to the first box day in vacation, may be reclaimed against on the second box day; and if dated after the first box day, then on the first sederunt day ensuing, or within such number of days from the date of such interlocutor as may be competent in the case of a reclaiming note against such interlocutor dated and signed during session.[1]

If in a reclaiming note the respondent objects to its competency it is competent for the Court to consider the competency of the Petition itself.[2]

II. Petitions Relative to Particular Judicial Factors.

(1) Factor *loco tutoris.*

(*a*) *Definition.*—A factor *loco tutoris* is an officer appointed by a competent Court to administer the estate of a pupil with heritable property in Scotland. Whether the pupil must be resident in Scotland has not been authoritatively determined.[4]

(*b*) *When Appointment Competent.*—An appointment is competent where there is no tutor.[5] Thus, where a widow presented a petition to be appointed factor *loco tutoris* to her two pupil children, the Court held that, as she was by law their tutor and had not resigned or renounced the office, the petition must be refused.[6]

It is also competent where the tutor is for some reason not available for the office. Thus, where a tutor has been removed from office;[4] is incapacitated;[7] has adverse interests;[8] or is an undischarged bankrupt,[9] a factor *loco tutoris* will be appointed.

[1] *Grant Juttie's Tutors* v *Viscountess Dalrymple*, 1883, 11 R. 3, Court of Session Act, 1868, sec. 94. See also *Countess Dowager of Seafield* v *Kemp*, 1898, 25 R. 873.

[2] *Wallace* v. *Whitelaw*, 1900, 2 F. 675.

[3] *Wight, &c., Petitioners*, 1837, 15 S. 1197; *Viscountess Alford, &c., Petitioners*, 1851, 13 D. 950; *Ross, &c., Petitioners*, 1857, 19 D. 699; *Lamb, Petitioner*, 1858, 20 D. 1323; *cf. Maclean, &c., Petitioners*, 1834, 12 S. 355; *Hay* v *Boreland*, 1837, 15 S. 850; *Lamb, Petitioner*, 1857, 19 D. 699.

[4] *Craigie, Petitioner*, 1758, Mor. 7455; *Buckie, Petitioner*, 1847, 9 D. 988; *Davison, &c., Petitioners*, 1855, 17 D. 629.

[5] *Willison, &c., Petitioners*, 1890, 18 R. 228.

[6] *Witherspoons, Petitioners*, 1775, Mor. 16372; *Edgar* v *Fisher's Trustees*, 1893, 21 R. 325.

[7] *Cowan, &c., Petitioners*, 1788, Mor. 7452; *Munnoch, Petitioner*, 1837, 15 S. 1267; *Macintyre, &c., Petitioners*, 1850, 13 D. 951.

[8] *Mann, Petitioner*, 1851, 14 D. 12; *Balfour Melville, Petitioner*, 1903, 5 F. 347; *cf. Cochrane, Petitioner*, 1891, 18 R. 456.

[9] *Johnstone* v *Wilson*, 1822, 1 S. 558 (N.E. 510); *Allan, Petitioner*, 1895, 3 S.L.T. 87.

Mere poverty is not a sufficient reason to supersede a tutor and appoint a factor *loco tutoris*;[1] but where a tutor is absent from the country and his affairs are embarrassed, a factor *loco tutoris* will be appointed.[2]

Formerly a tutor was not granted special powers, and a factor *loco tutoris* had to be appointed for that purpose,[3] but now tutors are granted special powers, and the necessity for the appointment of factors *loco tutoris* for that purpose no longer exists.[4]

The pupil's estate must be of some value before a factor *loco tutoris* will be appointed.[5]

(*c*) *Who may Petition.*—Anyone having an interest in the pupil or his estate may petition. The interest may be either to protect the pupil and his estate, or it may be to protect the petitioner himself. Thus, while friends of the pupil acting in his interest, such as his nearest relatives or next-of-kin,[6] or his step brothers and sisters,[7] may petition, a father with adverse interests,[8] or debtors to the pupil[9] may also petition, as it is for their interest to get a valid discharge.[10]

In the case of illegitimate children, a petition has been presented by a paternal grandmother,[11] and by friends who have afforded the pupil gratuitous support.[12]

Where a pupil child was on the parish poors' roll, a factor *loco tutoris* was appointed on the application of the committee of management of the heritors and kirk-session.[13]

[1] *Wardrop* v *Gossling*, 1869, 7 M. 532.

[2] *Macalister* v *Crawford's Trustees*, 1909, 1 S.L.T. 232.

[3] *Sawers, Petitioner*, 1850, 12 D. 905.

[4] *Lord Clinton, Petitioner*, 1875, 3 R. 62; *Campbell, &c., Petitioners*, 1880, 7 R. 1032.

[5] *Dunbar, Petitioner*, 1848, 10 D. 866; *cf. M'Gruther, Petitioner*, 1835, 13 S. 569; *Miller, Petitioner*, 1836, 15 S. 147.

[6] *Johnstone* v *Wilson*, 1822, 1 S. 558 (N.E. 510); *Macintyre, &c., Petitioners*, 1850, 13 D. 951; *Napier, Petitioner*, 1851, 14 D. 10.

[7] *Wood, &c., Petitioners*, 1849, 11 D. 1494.

[8] *Mann, Petitioner*, 1851, 14 D. 12; *Balfour Melville, Petitioner*, 1903, 5 F. 347.

[9] *Wardrop* v *Gossling*, 1869, 7 M. 532.

[10] *Jack* v *N. B. Rail. Co.*, 1886, 14 R. 263; *Connolly* v *Bent Colliery Co.*, 1897, 24 R. 1172.

[11] *Buckie, Petitioner*, 1847, 9 D. 988.

[12] *Davison, &c., Petitioners*, 1855, 17 D. 629.

[13] *Black, &c., Petitioners*, 1839, 1 D. 676.

(*d*) *Respondents.*—All parties interested should be called as respondents, otherwise the appointment may be recalled.[1] Intimation is necessary to the pupil's next-of-kin.[2] If service upon them is wished to be dispensed with, a petition to that effect must be presented to the Inner House, and the same may be granted if the nearest-of-kin are incapable of acting or are abroad.[3]

(*e*) *Who may be Appointed.*—In general any individual of full age who is solvent and has no adverse interest may be appointed. Whether it is necessary that the person to be appointed should be resident in Scotland has not been authoritatively settled,[4] but the practice is not to appoint any person outwith the jurisdiction of the Court,[5] unless in very special circumstances, and then only when he prorogates the jurisdiction of the Court.[6]

It is not usual to appoint more than one person,[7] and an appointment of one person, whom failing another, is never made.[8]

While women, married and unmarried, are eligible for the office,[9] it has not been the practice to appoint them.[10] A mother, however, on the death of her husband, is guardian to the pupil children of the marriage.[11]

A company cannot be appointed,[12] nor will a bankrupt;[13] and a stepfather is not looked upon favourably as a factor *loco tutoris*.[14]

[1] *Fowlds* v *Hodges*, 1836, 15 S. 244; *Lawson, &c., Petitioners*, 1894, 2 S.L.T. 308.

[2] *Cowan, &c., Petitioners*, 1788, Mor. 7452; *Logan, &c., Petitioners*, 1828, 6. S. 477.

[3] *Carmichael, Petitioner*, 1848, 10 D. 1286.

[4] *Robertson, Petitioner*, 1846, 9 D. 210; *cf. Scott, Petitioner*, 1851, 13 D. 951.

[5] *Napier, Petitioner*, 1902, 9 S.L.T. 439.

[6] *Sim* v *Robertson*, 1901, 3 F. 1027. See also *Lord Macdonald* v *His Next of Kin*, 1864, 2 M. 1194, ; *Fergusson* v *Dormer*, 1870, 8 M. 426.

[7] *Small, Petitioner*, 1822, 2 S. 106 (N.E. 100); *Pettigrew, Petitioner*, 1839, 1 D. 543; *Sloan, Petitioner*, 1844, 7 D. 227; *cf. Howden* v *Sibbald*, 1833, 11 S. 561; *Kirk, &c., Petitioners*, 1836, 14 S. 814.

[8] *Dow, &c., Petitioners*, 1847, 9 D. 616.

[9] *Chalmers' Trustees* v *Sinclair*, 1897, 24 R. 1047.

[10] *Thorburn, &c., Petitioners*, 1846, 8 D. 1000; *Lady Bethune, Petitioner*, 1851, 14 D. 11; *Galloway, Petitioner*, 1855, 17 D. 321; *cf. Cumming, Petitioner*, 1848, 20 Jur. 200.

[11] Guardianship of Infants Act, 1886.

[12] *Macfarlane* v *Donaldson*, 1835, 13 S. 725, per Lord Gillies, p. 734.

[13] *Fraser, &c., Petitioners*, 1849, 11 D. 1028; *Miller, &c., Petitioners*, 1849, 12 D. 911.

[14] *Forbes, Petitioner*, 1832, 10 S. 289 (note).

Formerly the Court refused to appoint a minister of the Church of Scotland,[1] but now the practice has changed.[2] Ministers of dissenting churches have been appointed.[3]

The person who is entitled to serve as tutor-at-law will not be allowed to be appointed,[4] unless he puts in a minute waiving his right to remuneration.[5] This condition cannot be imposed *ex post facto*.[6]

In a competition for the office, the Court sometimes prefers the nominee of the nearest agnate,[7] but it more often disregards the nomination of parties and makes a neutral appointment.[8]

Formerly it was necessary that the person appointed factor *loco tutoris* should make a further application to be appointed *curator bonis* when the pupil became a minor,[9] but now the factor *loco tutoris* becomes *ipso facto* a *curator bonis* on the ward arriving at minority.[10]

(*f*) *Recall.*—Where the estate of a pupil has been placed in the hands of the Court, the Court will not allow the appointment to be recalled unless the estate is properly safeguarded.[11]

(*g*) *Procedure.*—There is nothing exceptional in the procedure calling for special notice. See *Generally. Appointment*, p. 96 *et seq*; *Special Powers* (*f*), *supra*, 114; *Termination* (*b*), *supra*, p. 116.

[1] *Thomson, &c., Petitioners*, 1829, 8. S. 12; *Whitson and Crone, Petitioners*, 1832, 10 S. 268; *Brodie, Petitioner*, 1867, 3 S.L.R. 223.

[2] *Pool, &c., Petitioners*, 1896, 4 S.L.T. 216. See also *Campbell, Petitioner*, 1849, 12 D. 913.

[3] *Miller, Petitioner*, 1830, 8 S. 553; *Fletcher, &c., Petitioners*, 1850, 13 D. 951; *Henderson, &c., Petitioners*, 1850, 13 D. 951; *Forbes, &c., Petitioners*, 1853, 16 D. 109.

[4] *Mortimer, Petitioner*. 1845, 17 Jur. 457; *Cameron, &c., Petitioners*, 1849, 12 D. 912.

[5] *Jackson, Petitioner*, 1821, 1. S. 194, 203 (N.E. 183, 191); *Robertson; Petitioner*, 1830, 8 S. 307, 435 (note); *Jackson* v *Wight*, 1835, 13 S. 961, per L.P. Hope. See, however, *Accountant of Court* v *Watt*, 1866, 4 M. 772.

[6] *Macdonald* v *Macdonald*, 1854, 16 D. 1023.

[7] *Sinclair* v *Sutherland*, 1829, 7 S. 214; *Jackson* v *Wight*, 1835, 13 S. 961. See, however, *Armit, Petitioner*, 1844, 16 Jur. 471, per L.J.C. Hope.

[8] *Hutcheon* v *Alexander*, 1909, 46 S.L.R. 714. See also *Urquhart* v *Scott*, 1824, 2 S. 789 (N.E. 652); *Menteath* v *Menteath*, 1840, 2 D. 1234; *Robertson* v *Robertson*, 1840, 2 D. 1382; *Brown, &c., Petitioners*, 1848, 11 D. 1027; *Mac-Kintosh, &c., Petitioners*, 1849, 11 D. 1029.

[9] *Reid, &c., Petitioners*, 1882, 19 S.L.R. 546.

[10] 52 & 53 Vict. cap. 39, sec. 11; *Stiven* v *Masterton*, 1892, 30 S.L.R. 50.

[11] *Balfour Melville, Petitioner*, 1903, 5 F. 347; *Macalister* v *Crawford's Trustees*, 1909, 1 S.L.T. 232.

(2) *Curator Bonis to a Minor.*

(*a*) *When competent.*—As a minor *pubes* has the power to choose his own curators, the Court has always been reluctant to make the appointment of *curator bonis* by way of petition.[1] Accordingly, it usually refuses to make such an appointment unless in exceptional circumstances,[2] the most common being where the Court is asked in the same petition to appoint a factor *loco tutoris* to other members of the same family.[3]

Other exceptional circumstances are, where the minor cannot find anyone willing to undertake the office in a choosing of curators;[4] where the minor's freedom of choice is being interfered with;[5] or where the minor's father is alive and is bankrupt[6] or embarrassed,[7] or has adverse interests.[8]

Another exceptional circumstance is where the minor is illegitimate, but in this case the person appointed is a curator and not a *curator bonis*.[9]

It is not now considered an exceptional circumstance that the minor is unable to cite his next-of-kin in an action of choosing curators.[10]

A *curator bonis* will not be appointed to a minor against the latter's wish.[11]

A *curator bonis* has been appointed to a minor resident abroad with estate in Scotland.[12]

[1] *King's Trustees* v *M'Lay*, 1901, 8 S.L.T. 413, per Lord Pearson, 414; *Perry, Petitioner*, 1903, 10 S.L.T. 536, per Lord Pearson.

[2] *Bannantyne, &c., Petitioners*, 1827, 5 S. 684 (N.E. 638); *Maclean, &c., Petitioners*, 1834, 12 S. 355; *Mathew, &c., Petitioners*, 1851, 14 D. 312; *M'Whirter, &c., Petitioners*, 1852, 14 D. 761; *Mayne, &c., Petitioners*, 1853, 15 D. 554; *Barron, &c., Petitioners*, 1854, 17 D. 61; *Macarthur, Petitioner*, 1854, 17 D. 61 (note).

[3] *Perry, Petitioner*, 1903, 10 S.L.T. 536, per Lord Pearson. See also *Irvine, Petitioner*, 1850, 12 D. 912; *Sutherland, &c., Petitioners*, 1851, 13 D. 951; *Carter, &c., Petitioners*, 1857, 19 D. 286; *Simpson, Petitioner*, 1860, 23 D. 35.

[4] *Thomson, &c., Petitioners*, 1881, 19 S.L.R. 105; *Perry, Petitioner*, 1903, 10 S.L.T. 536.

[5] *Bower, Complainer*, 1750, Mor. 8910.

[6] *Johnstone* v *Wilson*, 1822, 1 S. 558 (N.E. 510).

[7] *Glassford, Petitioner*, 1849, 11 D. 1030.

[8] *Earl of Buchan* v *Harvey*, 1839, 2 D. 275.

[9] *Young, Petitioner*, 19th February, 1818, F.C.; *Wood, Petitioner*, 1834, 12 S. 663; *Ogilvy, Petitioner*, 1849, 11 D. 1029; *M'Neil, Petitioner*, 1849, 11 D. 1030.

[10] *Barron, &c., Petitioners*, 1854, 17 D. 61; *Macarthur, Petitioner*, 1854, 17 D. 61 (note).

[11] *Ross, Petitioner*, 1832, 5 Jur. 116; *Wood, &c., Petitioners*, 1849, 11 D. 1494; *Mayne, &c., Petitioners*, 1853, 15 D. 554; *Accountant of Court* v *Buchanan*, 1854, 16 D. 717; *Hutchison, Petitioner*, 1881, 18 S.L.R. 725; *Macdonald, Petitioner*, 1896, 4 S.L.T. 4; *Hutcheon, Petitioner*, 1909, 1 S.L.T. 71.

[12] *Burns, Petitioner*, 1851, 14 D. 311; *Hay, &c., Petitioners*, 1861, 23 D. 1291.

In one case where a minor was successful in obtaining an award of damages, the Court appointed a curator to her in order that the sum awarded should be held by the curator in trust until she should attain the age of 21 years.[1]

(*b*) *Jurisdiction.*—The Court of Session has jurisdiction to appoint a *curator bonis* to a minor or to an *incapax* resident, or having his property situated in Scotland, provided that if the minor or *incapax* is domiciled abroad and his property in Scotland consists of moveable estate, the appointment will only be *ad interim* until a guardian has been appointed by the Courts of his domicile.[2] If a foreign minor or *incapax* has heritable property in Scotland, the Court of Session has jurisdiction to appoint a permanent *curator bonis*, and will not recognise a guardian appointed by the Courts of his domicile.[3]

The Court may appoint a *curator bonis* to a domiciled Scotsman resident abroad.[4]

(*c*) *Petitioners.*—A petition may be presented by the minor alone,[5] or by the minor with the consent and concurrence of relatives,[6] or the petition may be a joint application by the minor and relatives,[7] or the minor may be a consenting party.[8] Anyone having an interest may petition alone where it is averred that the minor is being unduly prejudiced to his disadvantage.[9]

(*d*) *Who may be Appointed.*—It has been authoritatively decided that a married woman cannot be a *curator*

[1] *Spring* v *Blackall*, 1901, 9 S.L.T. 162. See also, *Anderson* v *Muirhead*, 1884, 11 R. 870; *Sharp* v *Pathhead Spinning Co.*, 1885, 12 R. 574.

[2] *Reid* v *Reid*, 1887, 24 S.L.R. 281. See also *Sawyer* v *Sloan*, 1875, 3 R. 271.

[3] *Buchan* v *Harvey*, 1839, 2 D. 275; *Lamb, Petitioner*, 1858, 20 D. 1323; *Sawyer* v *Sloan*, 1875, 3 R. 271, per L.P. Inglis, 272.

[4] *Dalrymple* v *Ranken*, 1836, 14 S. 1011; *Armit, &c., Petitioners*, 1844, 16 Jur. 471; *Murray* v *Baillie*, 1849, 11 D. 710; *Duff, &c., Petitioners*, 1910, 2 S.L.T. 202.

[5] *Perry, Petitioner*, 1903, 10 S.L.T. 536. See also *Towton, Petitioner*, 1847, 10 D. 225; *Webster, Petitioner*, 1849, 12 D, 911; (*Reid, Petitioner*, 1839, 14 Fac. 1058 (note), illegitimate minor).

[6] *Ross, Petitioner*, 1846, 8 D. 1219; *Roberts, Petitioner*, 1839, 14 Fac. 1059, (note); *Thomson, &c., Petitioners*, 1881, 19 S.L.R. 105.

[7] *Johnston, &c., Petitioners*, 1839, 14 Fac. 1058.

[8] *Watson, &c., Petitioners*, 1827, 2 Fac. 189; *Maclean, &c., Petitioners*, 1834, 12 S. 355; *Hutchison, Petitioner*, 1881, 18 S.L.R. 725.

[9] *Bower, Complainer*, 1750, Mor. 8910.

bonis to a minor.[1] The other considerations which apply to the case of a factor *loco tutoris* apply to the case of a *curator bonis* to a minor. See *supra*, p. 123.

(*e*) *Special Powers.*—Special powers will not be given in a petition for appointment of a *curator bonis*, but only on petition by the *curator bonis* after his appointment.[2] For the various special powers granted and procedure, see *supra*, p. 108 *et seq.*

(*f*) *Recall.* See *Termination*, *supra*, p. 115 *et seq.*

(*g*) *Procedure.*—There is no peculiarity in the procedure worthy of notice. See *supra*, p. 116.

(3) *Curator Bonis to an Incapax.*

(*a*) *Generally.*—While the process of cognition is the proper and regular mode of appointing a guardian or administrator to persons labouring under insanity or fatuity, the Court has for a long period been in use, where the relations legally entitled to follow out the process do not do so, to appoint a *curator bonis* to take charge of the estate. Such an appointment was at first, in its own nature, of a temporary character, but as the Court had no power to compel any party to sue out a brief of cognition, it was unable to limit the appointment to any definite period. Accordingly, the appointment of a *curator bonis* continues until evidence of convalescence has been adduced, or a tutor-at-law has been served.[3]

Again, the old process of cognition was of a complicated and protracted nature, and although a simplified procedure was introduced by section 101 of the Court of Session Act, 1868, it was found that owing to the restricted interpretation placed upon the original statute of 1585, cap. 25 (record edition), cap. 18 (*12mo. edition*), there were many cases in which it was impossible under the process of cognition to put under guardianship persons who were truly incapable of managing their own affairs The Court accordingly has been in use to appoint *curators bonis*

[1] *Chalmers' Trustees* v *Sinclair*, 1897, 24 R. 1047. See also *Kerbechill* v *Kerbechill*, 1586, Mor. 9585; *Stuart* v *Henderson*, 1636, Mor. 9585.

[2] *Perry, Petitioner*, 1903, 10 S.L.T. 536.

[3] *Bryce* v *Grahame*, 1828, 6 S. 425; affd. 1828, 3 W. & S. 323.

to persons not labouring under such an amount of mental incapacity as would warrant their being cognosced by an inquest as insane. A person alleged to be incapable of managing his own affairs has no right to demand cognition or a formal judicial inquiry at which witnesses may be examined on oath, with an opportunity for cross-examination, before an appointment is made. The procedure to be adopted is entirely within the discretion of the Court, and the question which the Court has to decide in all such cases is—whether the person is incapable of managing his own affairs and is also incapable of giving directions for their management.[1]

The prosecution of a brieve of cognition does not render an application for the appointment of a *curator bonis* incompetent.[2] In one case where both processes were pending at the same time the Court superseded consideration of the application for a *curator bonis* until the brieve of cognition was decided;[2] in another case the Court appointed the nearest agnate who was prosecuting a brieve of cognition to be *curator bonis ad interim*.[3]

(*b*) *Jurisdiction.* See *Jurisdiction, supra,* p. 94. *Curator bonis* to a minor (*b*) *Jurisdiction, supra,* p. 126.

(*c*) *Grounds of Petition.*—The incapacity alleged may be either (i.) mental or (ii.) physical.

(i.) *Mental.*—In practice the Court insists upon certificates to the effect that the alleged *incapax* is "a person "of unsound mind and unfit to manage his affairs, "or to give directions for their management."[4] "Unsound mind" in such certificates need not be complete insanity,[5] and a lady who was in such a state of mind "that, if left to herself, she would be "very apt to be misled both in regard to her own "conduct and the management of her affairs" was given a *curator bonis*.[6] The state of mind of the alleged *incapax* must, however, be such as to

[1] *A B* v *C B*, 1890, 18 R. 90; affd. 1891, 18 R. (H.L.) 40.
[2] *Irving* v *Swan*, 1868, 7 M. 86.
[3] *Simpson* v *Simpson*, 1891, 18 R. 1207.
[4] Antonio, p. 98.
[5] *Mackie, Petitioner*, 1866, 5 M. 60, per L.J.C. Inglis, p. 61.
[6] *Speirs, &c., Petitioners*, 1851, 14 D. 11.

result in a failure to manage, or give instructions for managing, his affairs. Accordingly, where a person laboured under an insane delusion which did not affect his capacity to manage his affairs, the Court refused to make an appointment.[1]

(ii.) *Physical.*—Mere physical weakness is not a sufficient ground for making an appointment; it is necessary that the physical weakness should have the effect of preventing the person from managing his affairs and giving instructions for their management.[2] Thus, where a lady of eighty-two years of age had had three attacks of paralysis and laboured under great bodily weakness, but was able to manage her affairs;[3] and where the only averments were old age and impaired health coupled with undue influence of a son,[4] the Court refused to make an appointment. Where, however, the physical weakness prevents the person from managing and giving directions for managing his affairs, a *curator bonis* will be appointed. Thus, paralysis[5] and apoplexy[6] have had that result; and persons deaf and dumb,[7] especially from their birth,[8] or deaf and blind,[9] have been given *curators bonis.*

The Court is, however, averse to making appointments where no actual mental incapacity exists.[10]

The following expression of the general rule on the subject was given by Lord President M'Neill[11]:—"It is very important that persons "who are labouring under physical defects that "disable them from managing their own affairs "should have the protection of the Court; but, on "the other hand, it is equally important that the

[1] *Forsyth, Petitioner*, 1862, 24 D. 1435.
[2] *Dewar* v *Dewar*, 1834, 12 S. 315.
[3] *Mackie, Petitioner*, 1866, 5 M. 60. See also *Simpson* v *Gardner's Trustees*, 1833, 11 S. 1049.
[4] *Dowie* v *Hagart*, 1894, 21 R. 1052, See also *Kirkpatrick, Petitioner*, 1853, 15 D. 734.
[5] *Andersons, Supplicants*, 1748, Mor. 7439; *Howie, Petitioner*, 1826, 5 S. 77 (N.E. 72).
[6] *Forster, Petitioner*, 1848, 11 D. 1031.
[7] Stair, iv., 3, 9. See, however, Ersk. Inst. i. 7, 48; iii. 1, 16.
[8] *Blaikie, Petitioner*, 1827, 5 S. 268 (N.E. 249).
[9] *Mark, Petitioner*, 1845, 7 D. 882. In this particular case a judicial factor and not a *curator bonis* was appointed.
[10] *Mackie, Petitioner*, 1866, 5 M. 60.
[11] *Kirkpatrick, Petitioner*, 1853, 15 D. 734, at p. 736.

"Court should not give effect to every objection "founded upon the physical defect of parties, and "not take upon themselves to supersede them in "the management of their affairs without being "satisfied of the necessity for interference."

(*d*) *Who may be Petitioner.*—A petition for a *curator bonis* may be presented by the *incapax* himself,[1] his relatives,[2] the Accountant of Court,[3] the Lord Advocate,[4] and also by any one interested, such as the law agent of the *incapax*,[5] the person with whom the *incapax* is residing,[6] trustees and creditors,[7] debtors,[8] of the *incapax*, heritors for a curator to a parochial schoolmaster,[9] executors of a former *curator bonis*,[10] and a factor *loco tutoris*,[11] each for a successor. A minor may be a petitioner.[12]

(*e*) *Who should be made Respondents.*—All interested, including the *incapax* himself, should be made respondents. If all interested are not made respondents, the petition for appointment may be recalled.[13]

(*f*) *Who may be Appointed.*—In general the same considerations apply to the appointment of a *curator bonis* to an *incapax* as apply to the appointment of a factor *loco tutoris* (*supra*, p. 123).

Adverse interest is a special disqualification for the office.[14] Thus, a person with whom an *incapax*

[1] *Briggs, Petitioner*, 1853, 2 Stuart, 184; *Mark, Petitioner*, 1845, 7 D. 882; *A B, Petitioner*, 1908, 16 S.L.T. 557.

[2] *Spence* v *Brownlee*, 1834, 13 S. 199 (*stepfather*); *Menteath* v *Menteath*, 1840, 2 D. 1234 (*sisters*); *Connon, &c., Petitioners*, 1848, 10 D. 1366; and *Wright, Petitioner*, 1849, 12 D. 911 (*brothers-in-law and sisters-in-law*); *Graham, Petitioner*, 1851, 13 D. 951 (*brother*); *Gatherer* v *Gatherer*, 1852, 14 D. 1046 (*halfbrother*); *Lockhart* v *Ross*, 1857, 19 D. 1075 (next heirs of entail); *Forster, Petitioner*, 1859, 22 D. 15, and *A B* v *C B*, 1890, 18 R. 90 (*wife*); *Elgin, &c., Petitioners*, 1890, 28 S.L.R. 271 (*mother, brother, and sister*).

[3] Judicial Factors Act, 1889, sec. 19 (see also sec. 3); *Accountant of Court* v *Morrison*, 1857, 19 D. 504.

[4] Lunacy Act, 1857 (20 & 21 Vict. cap. 71), sec. 81; *Lord Advocate, Petitioner*, 1860, 22 D. 555.

[5] *Hope, &c., Petitioners*, 1850, 13 D. 951; *Mason, Petitioner*, 1852, 14 D. 761.

[6] *Macpherson, Petitioner*, 1850, 13 D. 950; *Bonar, Petitioner*, 1851, 14 D. 10.

[7] *Kirk, &c., Petitioners*, 1836, 14 S. 814.

[8] *Lauder* v *Lauder*, 1851, 14 D. 14.

[9] *Ross, &c., Petitioners*, 1851, 13 D. 950.

[10] *Ballingal, &c., Petitioners*, 1853, 15 D. 711.

[11] *Scott, Petitioner*, 1855, 17 D. 362.

[12] *Stark* v *Stark*, 1746, Mor. 6291; *Wood, &c., Petitioners*, 1849, 11 D. 1494.

[13] *Lawson, &c., Petitioners*, 1894, 2 S.L.T. 309.

[14] *Armit, &c., Petitioners*, 1844, 6 D. 1088; *Leslie, Petitioner*, 1904, 12 S.L.T. 359.

lives in family,[1] or is boarded out,[2] will not be appointed *curator bonis*, nor will any person connected with the asylum where he is confined.[3]

It is unusual to appoint a *curator bonis* on his own application.[4]

Whether a nomination of a *curator bonis* by a person while sane to take effect in the event of his supervening insanity is a good nomination has not been definitely decided. In one case a third party was conjoined with two persons so nominated.[5]

In a recent case, the Lord Ordinary appointed a mother to be her son's *curator bonis*,[6] and in two recent cases a married woman was appointed.[7]

(*g*) *Interim Appointment.*—Where the case is urgent an *interim* appointment may be made, whether in session or during vacation.[8] See *Interim Appointment, supra*, p. 103.

(*h*) *Special Powers.*—At one time it was doubted whether a *curator bonis* to an *incapax* should be given special powers, but it has been now decided by the whole Court that it is competent to grant special powers in cases of necessity as disclosed by the facts of each particular case.[9] The particular special powers in use to be granted, &c., and the manner in which these are obtained have already been dealt with. See *supra*, p. 108, *et seq.*

(*i*) *Termination.*—The principles regulating the recall of the curatory, recall of the appointment, and exoneration and discharge of a *curator bonis* have already been fully dealt with. See *supra*, p. 115, *et seq.*

It is incompetent in a petition for discharge to

[1] *Ferguson, &c., Petitioners*, 1849, 12 D. 912.

[2] *Montgomery, &c., Petitioners*, 1855, 17 D. 623.

[3] *Gatherer* v *Gatherer*, 1852, 14 D. 1046.

[4] *Allan, Petitioner*, 1852, 14 D. 486.

[5] *Howden* v *Sibbald*, 1833, 11 S. 561. See also *Dick, Petitioner*, 1901, 9 S.L.T. 177.

[6] *Duff, &c., Petitioners*, 1910, 2 S.L.T. 202, and cases therein cited. See also *Lambe* v *Ritchie*, 1837, 16 S. 219.

[7] *Duncan, Petitioner*, 26th October, 1911, Lord Ormidale (unreported); *Smith Sligo, &c., Petitioners*, 1914, 1 S.L.T. 287. See *Chalmers' Trustees* v *Sinclair*, 1897, 24 R. 1047, per Lord Kinnear, p. 1050; *Anderson, &c., Petitioners*, 1829, 4 Fac. 445.

[8] *Davidson, &c., Petitioners*, 1830, 8 S. 1027; *Ellis, Petitioner*, 1836, 15 S. 262; *Barrie, &c., Petitioners*, 1866, 1 S.L.R. 137.

[9] *Maconochie, Petitioner*, 1857, 19 D. 366.

insert a crave for a decree against the executors of a deceased ward for balance of outlays.[1]

(*j*) *Procedure.*—The only matters with regard to which special attention requires to be drawn in petitions relative to *curators bonis* are with regard to (i.) service; and (ii.) the production of certificates; the rest of the procedure is similar to petitions relative to Judicial Factors generally (*q.v. supra*, p. 96, *et seq.*)

(i.) *Service.*—The petition must be personally served upon the alleged *incapax*,[2] unless in exceptional cases service is dispensed with.[3] The Court in one case stated that service upon an *incapax* should be in presence of the Sheriff or of his substitute.[4]

Service on one of the next-of-kin who was insane was held to be unnecessary.[5]

Where *incapax* is abroad, service may be edictal.[6] See *Service, supra*, p. 101.

(ii.) *Certificates.*—As the Court must satisfy itself by inquiry of the state of mind of the alleged *incapax*,[7] it is the practice that certificates from medical men should be produced along with the petition. In a recent case it was held that, although certificates may not be absolutely indispensable, they should be produced unless in very special cases.[8] Accordingly, in the ordinary case there should be lodged with the principal petition two distinct certificates,[9] on soul and conscience,[10] bearing the date when,[11] and the place where,[12] the alleged *incapax* was last seen, from separate medical men to the effect that the alleged *incapax* is incapable of the management of his affairs or of giving directions for their management, and copies should be printed along

[1] *Mackie* (Wallace's *Curator Bonis*), 1910, 1 S.L.T. 167.

[2] *Gordon* v *Gunn*, 1832, 11 S. 235; *Thomson, Petitioner*, 1847, 10 D. 148; *Macgregor, &c., Petitioners*, 1848, 11 D. 285.

[3] *M'Kechnie, &c., Petitioners*, 1890, 27 S.L.R. 261; *Allison, &c., Petitioners*, 1901, 8 S.L.T. 339; *Buyers, Petitioner*, 1910, 2 S.L.T. 201.

[4] *Scott, Petitioner*, 1855, 17 D. 362.

[5] *Hamilton, Petitioner*, 1899, 7 S.L.T. 226.

[6] *Allison, &c., Petitioners*, 1901, 8 S.L.T. 339.

[7] *Alston* v *Alston*, 1895, 23 R. 16.

[8] *Calderwood* v *Duncan*, 1907, 14 S.L.T. 777.

[9] *Robertson, Petitioner*, 1853, 16 D. 317.

[10] *Campbell, &c., Petitioners*, 1830, 8 S. 307 (note).

[11] *Lord Advocate, Petitioner*, 1860, 22 D. 555.

[12] *A B, &c., Petitioners*, 1861, 33 Jur. 686.

with and as an Appendix to the petition.[1] Where the *incapax* is, or was, the inmate of an asylum, the certificates must be from doctors unconnected with the asylum, whether the purpose is to have an appointment made,[2] or for the recall of the appointment.[3]

Forms of certificates are to be found in Antonio's Forms and Procedure in the Bill Chamber.[4]

(4) Factor *loco absentis.*

(*a*) *Where Appointment may be made.*—The Court may on petition appoint a factor *loco absentis* to a person absent from Scotland who has property there, or, it may be, a probable claim to property in Scotland.[5] Such an appointment is intended for the purpose of generally managing such property and not in order to carry out a particular purpose.[6] The absentee must be either known to be alive, or the presumption of his being alive must not have been overcome,[7] and until this has been done a factor *loco absentis* is the proper officer to manage the estate.[8]

The absentee must be ignorant of his right, or if not ignorant the unprotected state of his property must be due to unintentional want of attention, or the interests of third parties must have intervened.[9]

An *interim* appointment may be made,[10] even where there is no prayer to that effect.[11]

(*b*) *Who may Petition.*—Relatives, such as a wife,[12] a brother,[13] or a sister,[14] may petition, and so may creditors.[15]

[1] *Laidlaw, Petitioner*, 1846, 8 D. 426; *Kenmore, Petitioner*, 1849, 11 D. 1494; *Wright, Petitioner*, 1849, 12 D. 912.

[2] *Knox, &c., Petitioners*, 1894, 2 S.L.T. 388; *Kennedy, Petitioner*, 1901, 8 S.L.T. 415.

[3] *Simpson, Petitioner*, 1860, 22 D. 350.

[4] P. 98.

[5] *Watson, Petitioner*, 1864, 2 M. 1333, per Lord Deas, p. 1334.

[6] *Knight, Petitioner*, 1833, 11 S. 366.

[7] *White* v *Stevenson*, 1829, 7 S. 555; *Kennedy* v *M'Lean*, 1851, 13 D. 705.

[8] *Steel, &c., Petitioners*, 1874, 11 S.L.R. 160, per Lord Shand, 161.

[9] Thoms on Judicial Factors, p. 160 *et seq.*

[10] *Bremner, Petitioner*, 1833, 11 S. 551; *Brown, &c., Petitioners*, 1848, 11 D. 1027.

[11] *Dobson, Petitioner*, 1903, 11 S.L.T. 44. See also *Goold, &c., Petitioners*, 1856, 18 D. 1318.

[12] *Watson, Petitioner*, 1864, 2 M. 1333.

[13] *Tait's Factor* v *Meikle*, 1890, 17 R. 1182.

[14] *Kennedy* v *M'Lean*, 1851, 13 D. 705.

[15] *Dobson, Petitioner*, 1903, 11 S.L.T. 44.

(*c*) *Who may be Appointed.*—The usual rules applicable to judicial factors apply. See *supra*, pp. 123 and 130.

(*d*) *Termination.*—When the absentee returns,[1] or grants a mandate to some other person to act for him,[2] or the absentee dies,[3] the factory falls.

The general rules as to the recall of factories and appointments, and the discharge of factors are applicable (*q.v., supra*, p. 115, *et seq.*)

A factor *loco absentis* cannot get his discharge without submitting his accounts to the Accountant of Court.[4]

(*e*) *Procedure.*—There is nothing peculiar in the procedure calling for attention.

(5) *Judicial Factors under the Bankruptcy (Scotland) Act, 1913, sec.* 163.

(*a*) *Jurisdiction.*—There is some doubt whether this Petition should be presented to the Lord Ordinary on the Bills or to the Junior Lord Ordinary to be dealt with by him in the Bill Chamber.[5]

(*b*) *When Appointment competent.*—Any creditor, or person having an interest in the succession of a deceased person who has left no settlement appointing trustees or other persons having power to manage his estate or part thereof, or who has left such a settlement but the trustees or other parties appointed therein have not accepted or acted, may present a Petition.[6]

Where other parties are *in titulo* to administer the estate, such a petition will not be entertained;[7] and where trustees have been appointed and are about to confirm and act, though not confirmed at the date of the presentation of the petition, the application will be refused;[8] but the Court will make an appointment to supersede an executor-dative with an interest in conflict with the trust.[9]

A new appointment may be made where the

[1] *Mackenzie, Petitioner*, 1845, 7 D. 361.
[2] *Grant* v *Cameron*, 1835, 13 S. 966, per Lord Gillies, p. 971.
[3] *Muller* v *Wardrop*, 1846, 18 Jur. 540.
[4] *Craig* v *Accountant of Court*, 1907, 15 S.L.T. 645.
[5] 3 & 4 Geo. IV. cap. 20, sec. 2; A.S., 6th January, 1914; C.A.S., G. II., Schedule No. 1; 52 & 53 Vict. cap. 54, sec. 3; *Begg, &c., Petitioners*, 1893, 1 S.L.T. 274; *Curle's Trustees, Petitioners*, 1893, 1 S.L.T. 340.
[6] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. cap. 20), sec. 163.
[7] *Begg & Co., Petitioners*, 1893, 1 S.L.T. 274. See also *Macfarlane, Petitioner*, 1857, 19 D. 656.
[8] *London and Brazilian Bank, Ltd.* v *Lumsden's Trustees*, 1913, 1 S.L.T. 262. See also *Curle's Trustees, Petitioners*, 1893, 1 S.L.T. 340.
[9] *Lamb, &c., Petitioners*, 1902, 9 S.L.T. 438.

application shows that *prima facie* additional assets have emerged after the discharge of a previous factor.[1]

Where there is a petition for sequestration and a petition for the appointment of a judicial factor under this section, the latter application will be sisted pending the former being finally disposed of.[2] It is competent, however, to appoint a judicial factor under this section although there is already an *interim* judicial factor under section 14.[3]

Although this petition is under the Bankruptcy Act, the statute does not contemplate insolvency as a necessary element in the cases to which it relates, and accordingly the application can be made though the deceased may have left no debts at all, or although they may be quite insignificant.[4]

(*c*) *Form of Petition.*[5]—Every petition presented to the Court under section 163 of said statute shall be in the following form:—

_____Division.

[Junior Lord Ordinary.

____ _ _____Clerk.

Unto the Right Honourable the Lords of Council and Session.

The Petition of [*here state the names and designations of the petitioners, and whether they apply in the character of creditors or of persons having interest in the succession of the party deceased.*]

Humbly Sheweth—That [*naming and designing the party deceased*] died on the day of , and left no settlement appointing trustees or other parties to manage his estate, or part thereof [*or that the trustees or other parties appointed by him to manage his estate have not accepted or acted*].

That the petitioner (*or* petitioners) [*here state, if creditors, the nature and amount of the debt due to them by the deceased, and how constituted, vouched, or established, and referring to the evidence of the existence of the debt, as produced with the*

[1] *Wright, Petitioner*, 1901, 9 S.L.T. 278.

[2] *Sloan, Petitioner; Magistrates of Bathgate, Petitioners*, 1906, referred to and commented upon in Vol. xxii., p. 99, of the Scottish Law Review, April, 1906.

[3] *Youngson, &c., Petitioners*, 1911, 2 S.L.T. 448.

[4] *Alexander, Petitioner*, 1862, 24 D. 1334, per L.J.C. Inglis, p. 1339; *Masterton* v *Erskine's Trustees*, 1887, 14 R. 712, per L.P. Inglis, p. 716.

[5] C.A.S., G. II. 1; *Ibid.*, Schedule I.; A.S., 6th January, 1914.

petition, or, if persons having an interest in the succession, the nature of their interest in the succession].

That the estate of the said deceased , so far as known to the petitioner (*or* petitioners) consists of [*here state the nature of the estate, whether of heritable or moveable, stock in trade, interest in a partnership, professional business, or whatever else it may be. State any other facts which may appear to be of importance in the particular case.*]

That the following persons are, to the best of the petitioner's knowledge and belief, the legal representatives of the deceased, or have an interest in his estate. [*Here state the names and designations of those persons, their degree of relationship, or the nature of their interest in the succession.*]

That the following persons are, to the best of the petitioner's knowledge and belief, all the creditors of the deceased [*name and design them*].

That the petitioner is (*or* petitioners are) entitled, under section 163 of the Bankruptcy (Scotland) Act, 1913, to make the present application for the appointment of a judicial factor over the estate of the said deceased, with the powers therein conferred.

May it therefore please your Lordships to appoint intimation of this petition to be made on the walls and in the Minute Book in common form, and in the *Edinburgh Gazette*, and otherwise in such other form and way, and to such persons as to your Lordships may seem fit; and thereafter, on resuming consideration of the same, to appoint such fit person as to your Lordships shall seem proper to be judicial factor on the estate of the said deceased , and that with all the powers of the statute, he always finding caution before extract; or to do otherwise in the premises as to your Lordships shall seem proper.

[Signed by Counsel.]

(*d*) *Intimation in the "Edinburgh Gazette."*[1]—Besides intimation on the walls and minute book in common form, of which certificates shall be produced, intimation shall be made in the *Edinburgh Gazette*, according to the following form:—

To the creditors and other persons interested in the succession of the deceased

[*naming and designing him.*]

[1] C.A.S., G. II. 2; *Ibid.*, Schedule II.; A.S., 6th January, 1914.

A petition has been presented to the Court of Session, Division, Junior Lord Ordinary, Mr. , Clerk, by , a creditor [*or* creditors] to the amount required [*or* by having an interest in the succession of the deceased], the said deceased having left no settlement appointing trustees, or other parties having power to manage his estate [*or as the case may be*, the trustees under the deceased's settlement not accepting or acting], praying under the Act 3 & 4 Geo. V. cap. 20, sec. 163, for the appointment of a judicial factor upon said estate; and which petition will be again moved in Court, on or after the day of , of all which notice is hereby given.

[*Date.*]

[*Signature of petitioner's agent, and adding his place of business.*]

A full copy of the petition shall be served on such of the persons named in the petition, as representatives of the deceased, as are not parties thereto; and a copy of the *Edinburgh Gazette*, containing the intimation, and an execution or acknowledgment of service of the petition, shall be produced before the petition is disposed of.

(*e*) *Interim Appointments.*[1]—The Court shall not make the appointment of the judicial factor until the lapse of fourteen days, or such other time as the Court may fix, after both the publication of the notice in the *Gazette* and the date of service (when such service is required) of the petition on the representatives of the deceased; provided, however, that the Court, if in any case it shall see cause to do so, may make an *interim* appointment of such factor at any earlier date.

(*f*) *Notice calling for claims.*[2]—In order to ascertain the claims upon the estate the factor shall, within eight days of extracting his appointment, cause to be inserted in the *Edinburgh Gazette* a notice in the form, or as nearly as may be, set forth below, and he

[1] C.A.S., G. II. 3; A.S., 6th January, 1914.

[2] C.A.S., G. II. 4; *Ibid.*, Schedule III.; A.S., 6th January, 1914.

shall also insert a similar notice in such newspapers as may appear to him to be proper:—

To the creditors and other persons interested in the succession of the deceased [*designing him.*]

A B [*naming and designing him*], having been appointed by the Court of Session judicial factor on the estate of the said deceased under the Act 3 & 4 Geo. V. cap. 20, sec. 163, requires all the lawful creditors of the said and other persons interested in his estate, to lodge with the judicial factor within four months after the date of this notice, a statement of their claims as creditors of the deceased, or as otherwise interested in his estate; with such vouchers or other written evidence as they may have to found upon in support of their claims; in order to the same being considered and reported upon by the judicial factor.

[*Date.*]

[*Signature and address of judicial factor.*]

(*g*) *Claims.*[1]—The factor shall examine the claims of the creditors in order to ascertain whether the debts are justly due from the estate of the deceased, and may call for further evidence in support of the claims, and may, if he sees fit, require the creditors to constitute the same by decree in a competent Court in an action to which the factor shall be called as a defender.

(*h*) *Inventory of Estate.*[2]—The factor shall, within six months at latest from the date on which his appointment shall have been extracted, lodge with the Accountant a full inventory of the estate of the deceased, and shall produce therewith or exhibit all such writs and documents of importance belonging to the estate as may have been obtained by him, and shall at the same time report a state of the debts appearing to be due by the deceased, distinguishing those for which claims have been lodged by creditors, and the evidence upon which the same rest, and the claims made and lodged with him by persons interested in

[1] C.A.S., G. II. 5; A.S., 6th January, 1914.

[2] C.A.S., G. II. 6; A.S., 6th January, 1914.

the succession of the deceased, and the grounds thereof. And the said inventory, when adjusted and signed as aftermentioned, with the state of debts, shall remain in the possession of the Accountant; and all creditors and persons interested in the succession of the deceased, or their agents, shall have access to see the same in the hands of the Accountant at his office.

(*i*) *Scheme of Division.*[1]—The judicial factor shall prepare a state of funds and scheme of division amongst the creditors, and shall lay the same before the Accountant, along with all writings and documents upon which it proceeds, and shall afford to the Accountant all explanations thereon which may be required by him. And the Accountant shall make a report in writing on the said state of funds and scheme of division, containing such observations thereon as he shall think fit and proper to be submitted to the Court.

(*j*) *Notice of Scheme of Division to Creditors.*[2]—Immediately on the Accountant's report being made, the factor shall lodge the same in Court, and shall transmit to each person who has lodged with him a claim on the estate of the deceased a notice by post intimating that the state of funds and scheme of division, and report thereon, have been lodged in Court, and stating the amount for which the creditor has been ranked, and whether his claim is to be paid in full, or by a dividend, and the amount thereof, and in case of claims rejected, stating that fact; and a notice in the following form shall also be inserted in the *Edinburgh Gazette*:—

To the creditors and other persons interested in the succession of the deceased [*designing him*] A B, , Judicial Factor upon the estate of the said deceased , hereby intimates that he has prepared and lodged in Court, Division, Junior Lord Ordinary, Mr. , Clerk, a state of funds and scheme of division of the said estate, to be

[1] C.A.S., G. II. 7; A.S., 6th January, 1914; *Alexander, Petitioner*, 1862, 24 D. 1334.

[2] C.A.S., G. II. 8; *Ibid.*, Schedule IV.; A.S., 6th January, 1914.

considered and approved of by the Court, of which all concerned are hereby required to take notice.

[*Date.*]

[*Signature and address of judicial factor.*]

If any persons, other than those who have lodged claims with the factor, shall be stated in the petition to the Court, or in the books, deed of settlement, or other papers of the defunct, to be creditors of the estate or interested therein; or if the factor shall otherwise have reason to believe that other persons are in either of these predicaments, he shall give notice by letters, through the post office, to such persons, that no dividend is allotted to them in the scheme of dividend.

(*k*) *Objections to Scheme of Division.*[1]—All creditors, and other persons interested in the succession of the deceased, shall be entitled to examine the state of funds and scheme of division lodged in Court, and also the claims and the vouchers, or evidence thereof lodged with the factor; and any creditor or other person dissatisfied with the state of funds and scheme of division may lodge a note of objections thereto, signed by counsel, with the clerk of the process, within three weeks from the last date of such notices; and till the lapse of said period of three weeks, the Court shall not be moved to approve of the state of funds or scheme of division.

(*l*) *Objections to be Disposed of by the Court.*[2]—If objections are lodged to the state of funds and scheme of division, the Court shall dispose of the same, after hearing counsel for the objecting creditors and judicial factor, and making all necessary investigation in regard to the same. If the objections be sustained to any extent, the necessary alterations shall be made on the said state and scheme.

(*m*) *Adjusted Scheme of Division.*[3]—When the scheme of division is adjusted, it shall be approved of by the Court; and the factor shall pay, deliver, or convey to

[1] C.A.S., G. II. 9; A.S., 6th January, 1914.

[2] C.A.S., G. II. 10; A.S., 6th January, 1914.

[3] C.A.S., G. II. 11; A.S., 6th January, 1914.

the parties therein set forth, the sums or subjects allocated to them respectively in the said scheme of division.

(*n*) *Partial Dividends on First Scheme of Division.*[1]—Where a partial division of funds among the creditors who have claimed may be made with safety to the interests of all concerned, the judicial factor may, with the approval of the Accountant, prepare a state of the funds and first scheme of division, and that at as early a period after the time notified for lodging the claims of creditors upon the estate as he may be enabled to do it; and the same having been submitted to the Accountant, and reported on by him to the Court, and notice having been given in terms of section (*j*) to each creditor, of such state of funds and first scheme of division having been lodged, the Court may, six months having elapsed from the day of the death of the deceased, on considering the same, approve of that scheme of division, and the factor shall pay, deliver, or convey in terms thereof; Provided always, that dividends corresponding to the amount of the claims of creditors whose debts have not at that period been admitted by the judicial factor, or whose debts are future or contingent, and also the full amount of such debts as are claimed as preferable, but the preference is not admitted by the factor, shall be retained and set apart to meet such claims, if ultimately sustained, or when the same shall become payable or prestable.

(*o*) *Deathbed and Funeral Expenses, &c., of Deceased.*[2]—The factor shall be entitled, out of the first of the funds realised by him, and without waiting for the expiry of six months from the death of the deceased, to pay the deathbed and funeral expenses of the deceased, rent, taxes, and such servants' wages as are privileged debts, and interest becoming due, or past due, to creditors having preference over the estate.

(*p*) *Disposal of Surplus of Estate.*[3]—In the event of there

[1] C.A.S., G. II. 12; A.S., 6th January, 1914.

[2] C.A.S., G. II. 13; A.S., 6th January, 1914.

[3] C.A.S., G. II. 14; A.S., 6th January, 1914; *Alexander, Petitioner*, 1862, 24 D. 1334.

being a residue after payment of the creditors, the judicial factor shall submit to the accountant a statement of the amount of the residue, the parties claiming the same, and their respective grounds of claim; and he shall pay over the residue to the party or parties found entitled thereto by the Lord Ordinary on report by the Accountant.

(*q*) *Discharge of Factor.*[1]—When applying to the Court for his discharge the factor shall intimate the petition to the representatives of the deceased, and insert a notice thereof in the *Edinburgh Gazette* in the following terms, and the petition shall not be disposed of until fourteen days after such insertion.

To the creditors and other persons interested in the succession of the deceased [*designing him.*]

A B judicial factor on the estate of the deceased , has presented a petition to the Court of Session, Division, Junior Lord Ordinary, Mr. Clerk, for his discharge of the office of judicial factor, of which notice is hereby given, and that the petition will be again moved in Court on or after the day of

[*Date.*]

[*Signature and address of judicial factor.*]

The rules of procedure applicable to the discharge of ordinary judicial factors apply to the discharge of factors appointed under section 163 of the Bankruptcy Act, 1913. See *supra*, p. 118.

(*r*) *Caution.*—Caution must be found as in the case of an ordinary judicial factor, and within the same period. See *supra*, p. 105.

(*s*) *Special Powers.*—The regulations applicable to ordinary judicial factors apply to the case of factors appointed under section 163 of the Bankruptcy Act, 1913. See *supra*, p. 108. A crave for special powers, except possibly a crave for power to make up title, will not be granted at the time of appointment.[2]

(*t*) *Recall.*—The rules applicable to ordinary judicial factors

[1] C.A.S., G. II. 15; A.S., 6th January, 1914.

[2] *Macfarlane, &c., Petitioners*, 1857, 19 D. 656.

apply. See *supra*, p. 115. It is entirely in the discretion of the Court to recall a judicial factory or not.[1]

Sequestration may at any time cut down a factory.[2]

III. Miscellaneous Petitions.

(1) *Petition for Interim Audit.*—A judicial factor may present a petition for the *interim* audit of his accounts whenever any event makes such a proceeding advisable or necessary.[3] Thus, where a co-cautioner died, and it was desired to deliver the bond of caution and to discharge the former cautioners, the factor presented a petition for the *interim* audit of his accounts.[4] Such a petition is an application incidental to the original petition for appointment.

The petition sets forth the history of the factory to date and gives the reason for the advisability or necessity of an *interim* audit. The prayer is for intimation and service on all the parties interested, including the cautioner, and, with or without answer, to remit to the Accountant of Court to examine and audit the accounts and to report; and, thereafter, on a report from the Accountant to approve of the accounts, to declare the balance due thereon, to find the petitioners entitled to expenses of the application out of the estate, and to decern *ad interim*.

(2) *Applications by Accountant of Court.*—When any factor under the Judicial Factors Act, 1849, or under section 6 of the Judicial Factors Act, 1889, has died undischarged, or has ceased to discharge the duties of his office without anyone having been appointed in succession to him, unless the purposes of his appointment have been exhausted, it is the duty of the Accountant of Court to apply to the Court for the appointment of a factor in place of such factor, unless the persons interested in such factory shall make the application themselves.[5]

The Accountant of Court may also bring before the Court the conduct of persons under his supervision. Thus, if any order or requisition which the Accountant is authorised to make on any factor is disobeyed or neglected, he shall report the same to

[1] *Masterton* v *Erskine's Trustees*, 1887, 14 R. 712, per L.P. Inglis, 716.

[2] *Simpson* v *Myles*, 1881, 9 R. 104.

[3] *A. B., Petitioner*, 1854, 16 D. 1004; *Morison, Petitioner*, 1856, 19 D. 132; *Jamieson, Petitioner*, 1871, 10 M. 26.

[4] *Miller, Petitioner*, 1895 2 S.L.T. 520.

[5] Judical Factors (Scotland) Act, 1889, sec. 10.

the Lord Ordinary, giving previous notice to the factor or his agent, who shall lodge objections in writing within 48 hours after such notice.[1] The factor may object to the competency of the Accountant's orders or requisition.[2] For further procedure see the undernoted cases.[3]

(3) *Note by Curator Bonis for Delivery of Documents.*—Where a *curator bonis* obtained decree in absence ordaining the wife of his ward to deliver to the curator a policy of insurance over his ward's life, and a charge on the decree having expired without result, the curator presented a Note craving warrant to search for and recover the document, and the Court granted the warrant asked for.[4]

(4) *Prorogation, &c.*—A prorogation of the time for lodging objections to the report of the Accountant of Court has been granted on petition ;[5] and a petition to receive a bond of caution after the prescribed period has been granted.[6]

IV. Expenses.—*See* Maclaren on Expenses, pp. 224 and 342. In a recent Petition for exoneration and discharge by a *curator bonis* who was a Writer to the Signet, the Auditor disallowed professional charges by the curator for carrying through said Petition, and the Lord Ordinary upheld the Auditor's decision, but allowed the curator to charge against the curatorial estate an additional sum as commission in respect of work done by him and not allowed for in the fee fixed by the Accountant.[7]

[1] 12 & 13 Vict. cap. 51. sec. 19.

[2] *Accountant of Court* v *Baird*, 1858, 20 D. 1176.

[3] *Accountant of Court* v *Jaffray*, 1851, 14 D. 292; *Wilson*, 1852, 25 Jur. 296; *Dewar*, 1853, 16 D. 163; *M'Allister*, 1853, 16 D. 301; *Wilkie*, 1856, 18 D. 793; *Geddes*, 1858, 20 D. 1174.

[4] *Romanes* (*Ferguson's curator bonis*), *Petitioner*, 1905, 7 F. 898. See also *M'Alley's Judicial Factor, Petitioner*, 1900, 2 F. 1198.

[5] *Ross, Petitioner*, 1856, 18 D. 795.

[6] *Campbell, &c., Petitioners*, 1855, 18 D. 292.

[7] *Alastair Dallas, Petitioner*, 20th March, 1915.

CHAPTER VII.

ENTAIL PETITIONS.

(1) *Petition to Record Deed of Entail.* — Although an unrecorded deed of entail is sufficient to protect the entailed estate from the gratuitous deeds of heirs of entail, it affords no protection against onerous creditors of the heir of entail in possession.[1] Accordingly, the heir in possession under an unrecorded deed of entail can sell the estate,[2] and is not bound to re-invest the price under the fetters of the entail.[3] To obviate this it is necessary that the deed of entail should be recorded with the authority of the Court.[4]

The authority of the Court is obtained by petition. The petition is addressed to the Court but is marked to the Junior Lord Ordinary, and sets forth that of a certain date the maker of the entail executed a disposition and deed of entail of lands which are carefully described; that the said disposition contains prohibitory clauses, and an express clause authorising registration on the Register of Entails in terms of "The Titles to "Land Consolidation (Scotland) Act, 1868," sec. 14; that the petitioner is the institute of entail (*or* the maker of the entail, *or* the maker's trustees, *or* the heir-substitute), and is desirous of having the said deed of entail recorded in terms of the Act, 1685, cap. 26 (*record edition*), cap. 22 (*12mo. edition*), and the subsequent statutes thereanent.

Where the petition is at the instance of the maker of the entail, the institute, or a substitute in possession, no intimation or service is necessary, and consequently the prayer in such a petition is simply for the Court to interpone its authority to the said deed of entail and to grant warrant to and ordain the

[1] *Willison* v *Callender*, 1724, Mor. 15369; *Rose* v *Drummond*, 1828, 6 S. 945; 1831, 5 W. & S. 359; *Ross* v *Drummond*, 1836, 14 S. 453.

[2] *Grahame* v *Grahame*, 1829, 8 S. 231.

[3] *Montgomerie* v *Earl of Eglinton*, 1843, 2 Bell's App. 149.

[4] Act, 1685, cap. 26 (record edition); cap. 22 (12mo. edition).

Keeper of the Register of Entails to record the same. Where the petition is at the instance of trustees of the maker of the entail or of a substitute not in possession, the prayer should be for intimation on the walls and in the minute book and for service on the institute, unless there is *periculum in mora*.[1] Service on the latter may also be dispensed with where the petition is with his consent and concurrence.

In all petitions the deed of entail must be produced,[2] and if the petitioner has not possession of it, diligence will be granted for its recovery.[3] Where the deed has been lost, the deed as revived by a decree of proving the tenor will suffice.[4]

Where the petition is at the instance of the maker of the entail, the institute, or a substitute in possession, the prayer of the petition is granted *de plano* in terms of the prayer. Where the petition is at the instance of trustees of the granter or of a substitute not in possession, the institute may lodge answers and oppose the petition and is entitled to be heard;[5] and if he can state any clear, tangible, and positive injury to himself the registration may be refused.[6]

A person who has raised an action of declarator to find that the entail is invalid has no interest to oppose a petition to have the entail recorded.[7]

An inaccuracy in recording a deed of entail has not the effect of destroying the whole deed but only that branch of the deed where the inaccuracy occurs, and it will have that effect only where the inaccuracy in recording is such as impairs and contradicts the effects of the other parts of the deed as standing on record.[8]

A copy of the interlocutor written on a print of the petition and certified by the clerk is a sufficient warrant for the Keeper of the Record of Entails to record the deed of entail. The decree does not require to be extracted.[9]

A petition to record a deed of nomination of heirs of entail in

[1] Shand's Practice, p. 1019-20.
[2] Act, 1685, cap. 26 (record edition); cap. 22 (12mo. edition).
[3] *Spittal, Supplicant*, 1781, Mor. 15617; *Ker, Petitioner*, 1804, Mor. 14984; Shand's Practice, p. 1018-9.
[4] Shand's Practice, p. 834 (note), 1018-9.
[5] *Lockhart* v *Lockhart*, 1694, 4 Br. Supp. 166; *Gilmour's Trustees* v *Gilmour*, 1856, 19 D. 134.
[6] *Gilmour's Trustees* v *Gilmour*, 1856, 19 D. 134, per L.P. M'Neill, p. 135.
[7] *Glassford* v *Borthwick*, 1862, 24 D. 1136.
[8] *Norton* v *Stirling*, 1852, 14 D. 944.
[9] Antonio, p. 148.

terms of the Act, 1685, cap. 22, and subsequent statutes thereanent, is similar in every respect.[1]

(2) *Petitions to Disentail.*

(*a*) *Who may Petition.*—An heir of entail in possession who is major may present a petition for disentail,[2] even although he holds by a title which will be defeasible on the birth of a nearer heir,[3] or by succeeding in the future to a peerage.[4] A person who has had a *portion* of the fee of an entailed estate propelled in his favour is not an heir of entail in possession in terms of the statute enabling him to petition for disentail;[5] nor can the heir in possession of an entailed estate to whom the succession to a second entailed estate has opened on condition that he gives up the first estate, be held to be the heir in possession of the second estate until he decides to give up the first estate.[6] Where in a marriage contract the lady's father entailed an estate in favour of himself in liferent and after his death the spouses and the longest liver of them also in liferent and the heir male, whom failing the heir female of the marriage in fee, and on the dissolution of the marriage by the death of her father the eldest daughter was ascertained to be the heir of the marriage, she was held to be the heir of entail in possession.[7]

It is incompetent for an heir in possession who is a minor, with consent of his curators, or for the tutors of an heir in possession, if he is a pupil, or for his curator or other administrator if he is otherwise incapacitated, to make an application to the Court under the Entail Acts, and to execute and carry into effect any authority which may be given by the Court.[8]

Where an heir in possession has disappeared for seven years and cannot be found, the Court may

[1] *Duke of Argyll, Petitioner*, 26th June, 1914, Lord Anderson (unreported).

[2] 11 & 12 Vict. cap. 36, sec. 2 (*The Rutherfurd Act*).

[3] *Bruce, Petitioner*, 1874, 1 R. 740.

[4] *Forbes* v *Burness*, 1888, 15 R. 797.

[5] *Viscount Dupplin* v *Hay*, 1871, 10 M. 89; *Brander, Petitioner*, 1902, 9 S.L.T. 380.

[6] *Home* v *Home*, 1876, 3 R. 591.

[7] *Maule, Petitioner*, 1876, 3 R. 831.

[8] Entail (Scotland) Act, 1882 (45 & 46 Vict. cap. 53), sec. 11.

appoint a factor *loco absentis* to such heir and grant authority to and ordain the factor to execute an instrument of disentail, and if the heir in possession has disappeared for less than seven years and a factor *loco absentis* has been appointed by the Court such factor may apply to the Court for authority to feu, lease, borrow, and charge for improvements in the same manner as the heir in possession himself might have done.[1]

A creditor who has charged an heir of entail in possession of an entailed estate and has not been paid within six months of the expiry of the charge may petition for disentail of said estate, and if the debt is not paid within three months of the presentation of the petition the Court will ordain the heir, and, if he refuses, the Clerk of Court, to execute an instrument of disentail.[2] In the same way the trustee on the sequestrated estates of an heir in possession of an entailed estate may apply to the Court for authority to disentail such estate.[3]

Should the applicant die his personal representatives or his successor in the entailed estate, or his disponee, legatee, or assignee, or any of them, according to their respective rights and interests, shall, except in the case of applications in which it is necessary to obtain the consent or the dispensing with the consent of one or more heirs of entail, be entitled to be sisted in the process, at whatever stage the death may happen, and to prosecute the same.[4] This only applies, however, where the parties asking to be sisted have right and interest to insist apart from the clause in the statute, which is only directed towards procedure.[5]

(*b*) *Form of Petition.*—The petition is addressed to the Court, but is marked to the Junior Lord Ordinary, to

[1] Entail (Scotland) Act, 1882, sec. 14; Presumption of Life Limitation Act, 1891, sec. 8.

[2] Entail (Scotland) Act, 1882, sec. 18.

[3] *Ibid.*; *Lord Napier and Ettrick's Trustee* v *Napier*, 1901, 3 F. 579; *More, Petitioner*, 1903, 10 S.L.T. 780; 11 S.L.T. 259; *Tait, Petitioner*, 1905, 13 S.L.T. 441; 1909, S.C. 1125.

[4] Entail Amendment (Scotland) Act, 1875, sec. 12 (3).

[5] *Maxwell, Petitioner*, 1877, 4 R. 1112, per L.J.C. Moncreiff, 1117; *cf. Robertson, Petitioner*, 1864, 2 M. 1178.

whom it is presented.[1] Section 33 of the Entail Amendment Act, 1848, provides that "the tailzie "under which the entailed estate is held and the "date of the petitioner's infeftment therein, if any "be, and the names, designations, and places of "abode, so far as known to the petitioner, of the "heirs substitute of entail (if any) whose consents "are required to such petition, and whether such "heirs substitute are of age to consent on their own "behalf, and if not, then the names, designations, and "places of abode of their fathers, or tutors or curators "or other legal guardians, and if such heirs sub-"stitute or any of them are the children of such heir "of entail in possession himself, and are minors, "legally incapacitated to act in their own affairs, the "same shall be stated in such petition, and such "petition shall also set forth specifically to what "extent and in what way and manner such estate is "proposed to be affected."

Accordingly the petition sets forth that the petitioner is heir of entail in possession of certain entailed lands under a disposition and deed of entail which is fully described, the name of the granter of the disposition, the destination, and date of recording being given. The petitioner's infeftment is then narrated and the fact that the petitioner is of full age and not subject to any legal incapacity. The date of his birth is also given.

Where *no* consents are necessary, the clauses of the Entail Acts whereby the petitioner is entitled to disentail at the sight of the Court and without consents are quoted *in extenso*, and the facts which bring the petitioner under these clauses are given.

Where consents are necessary, the clauses of the Entail Acts applicable to the petitioner's circumstances are quoted *in extenso*.

In every case, the names and designations of the three heirs entitled to succeed to the said entailed lands in their order successively after the petitioner

[1] Entail Amendment Act, 1875, sec. 12 (1).

are then given, and it is stated whether these heirs, or any of them, are of full age and subject to no legal incapacity, or whether any of them requires the appointment of a *curator ad litem*.

Where consents are necessary the petitioner states that deeds of consent will be produced in the course of the proceedings failing which it will be necessary to ascertain the value in money of the expectancy or interest of said heirs in reference to the application.

In every case it is stated that a schedule of debts and an instrument of disentail will be produced in the course of the proceedings.

The prayer is for intimation, advertisement, and service on the next three heirs; to appoint *curators ad litem* (if necessary); to appoint the said heirs to lodge answers, if so advised, within seven days if said heirs are in Scotland, and within fourteen days if furth of Scotland; and on resuming consideration with or without answers, and after such inquiry as is necessary, to find the procedure regular; to approve of the instrument of disentail; and to grant warrant for registration of the same.

(*c*) *Service.*—See *service, supra*, p. 101. Where the respondent is furth of Scotland and service is edictal, intimation must also be made by the petitioner's agent to such party's known agent in Scotland, if he has any known agent there, and a certificate must be produced in process, signed by the petitioner's agent, stating either that such intimation has been made, or that the party has no known agent in Scotland.[1]

Where the party called is in minority, or subject to any legal incapacity, and has a father, or known tutors or curators, or other legal guardians, one or more, other than the petitioner, such petition must, besides being served in the usual form, be also served on such father, or on one, at least, of such tutors, curators, or other legal guardians, in the same manner as if he were a party called.[2]

When the party called is in minority, and the

[1] C.A.S., C. V. 1 (*b*).

[2] C.A.S., C. V. 1 (*c*).

petitioner is the father, or sole tutor, curator, or legal guardian of such party, it shall not be necessary to serve the petition on the petitioner as the party's legal guardian, or to use the form of service on the tutors and curators of such party at any market cross; but in the course of the application, a separate tutor *ad litem*, or *curator ad litem*, or *curator bonis*, or other guardian, shall be appointed to such party.[1]

The Court has power to order intimation and service otherwise or additionally, or to dispense in whole or in part with service according to circumstances.[2] Although it is only necessary that service should be made on the heirs of entail whose consent are required,[3] it is a matter in the discretion of the Court,[4] and the practice is to serve the petition on the next three heirs of entail, or on all, if these are less than three.[5]

Where a creditor, or a trustee in a sequestration, of an heir in possession makes application for disentail, intimation to the heirs whose consents are required, or must be dispensed with, cannot validly be given until after the expiry of three months from the date of the application.[6]

Service may be accepted, but the agents who accept service must be practitioners in the Court of Session.

(*d*) *Intimation.*—This must be made in the Minute Book and on the walls in common form.[7] This is done by the petitioner's agent writing a copy of the deliverance on a print of the petition to which is affixed a one shilling Law Court stamp and handing the same to the hallkeeper at the Parliament House, who places it upon the walls of the lobby of the Parliament House. Intimation in the Minute Book is made by the Clerk of Court.

[1] C.A.S., C. V. 1 (*d*).
[2] C.A.S., C. V. 1 (*e*).
[3] Entail Amendment Act, 1848, sec. 36.
[4] *Davys, Petitioner*, 1870, 9 M. 44.
[5] *M'Dougall, Petitioner*, 1850, 12 D. 906; *Duke of Portland, Petitioner*, 1893, 1 S.L.T. 144; *Stuart, Petitioner*, 1906, 14 S.L.T. 563.
[6] *Lord Napier and Ettrick's Trustee* v *Napier*, 1901, 3 F. 579; *Duke, Petitioner*, 1901, 9 S.L.T. 35.
[7] Entail Amendment (Scotland) Act, 1875, sec. 12 (4).

(*e*) *Advertisement.*—This is done once in the *Edinburgh Gazette* and once in some newspaper published or circulating in a county in which the estate or some portion thereof is situated.[1] It is sufficient in the advertisement to state the leading name by which the lands are commonly known, without any detailed description thereof, and the leading description of the application without any detailed statement of such purpose.[1]

(*f*) *Inducicæ.*—In practice advantage is taken of the opportunity of having the same *inducicæ* as in ordinary actions, and the *inducicæ* of entail petitions is usually seven days if the respondent is in Scotland, unless in Orkney and Shetland or in any other island of Scotland, and fourteen days where he is in Orkney or Shetland or such other island, or furth of Scotland.[2] If no provision is made in the interlocutors or orders of the Court in the particular case the *inducicæ* is fourteen days from the date of service if the respondent is within Scotland, or forty days if within Shetland or Orkney; where the party called is furth of Scotland, he is allowed sixty days from the date of service for answering the petition.[3]

(*g*) *Productions.*—In the course of the proceedings the following productions will require to be made:—

(i.) Certificates of birth of the petitioner and the three next heirs of entail;

(ii.) Deed of entail, service, &c.;

(iii.) Instrument of disentail;

(iv.) Newspapers containing the advertisements of the petition.

(*h*) *Where Consents are Unnecessary.*—Petitions to disentail do not, in the following circumstances, require consents:—

In *old* entails, *i.e.*, entails dated prior to 1st August, 1848,—

(i.) Where the heir of entail in possession is born on or after 1st August, 1848, and is of full age;[4] and

[1] Entail Amendment (Scotland) Act, 1875, sec. 12 (4).

[2] Entail Amendment (Scotland) Act, 1875 (38 & 39 Vict. cap. 61), sec. 12 (4); Court of Session Act, 1868, sec. 14.

[3] C.A.S., C. V. 1.

[4] Entail Amendment Act, 1848, sec. 2.

(ii.) where the heir of entail in possession is the only heir in existence at the time, and is of full age.[1]

In *new* entails, *i.e.*, entails dated on or after 1st August, 1848—

(i.) Where the heir of entail in possession is born after the date of the entail, and is of full age;[2] and

(ii,) where the heir of entail in possession is the only heir of entail in existence at the time, and is of full age.[3]

(*i*) *Where Consents are Necessary.*—Petitions to disentail require consents in the following circumstances:—

Where the entail is a *new* entail and the heir in possession, being of full age, is born before, and the heir apparent, being of full age, is born after, the date of the entail, the consent of the heir apparent is necessary.[4]

Where the entail is an *old* entail and the heir of entail in possession, being of full age, is born before 1st August, 1848, and the heir apparent, being of full age and not subject to any legal incapacity, is born on or after 1st August, 1848, the consent of the heir apparent is necessary.[5]

Irrespective of the date of the birth of the heir in possession and of whether the entail is old or new the heir in possession, when of full age, may disentail with the following consents:—

(i.) the consents of the heir apparent and of the heir, or heirs, in number not less than two including such heir apparent, who in order successively would be heir apparent.[6]

(ii.) the consents of the whole heirs of entail, if there be less than three in being at the date of such consents and at the date of presenting such application;[7] or,

[1] Entail Amendment Act, 1848, sec. 3; Entail Amendment Act, 1875, sec. 5 (3); *cf. Bruce Gardyne* v *Bruce Gardyne*, 1883, 11 R. 60.

[2] Entail Amendment Act, 1848, sec. 1.

[3] Entail (Scotland) Act, 1882, sec. 3.

[4] Entail Amendment Act, 1848, sec. 1; Entail Amendment Act, 1875, sec. 4.

[5] Entail Amendment Act, 1848, sec. 2; Entail Amendment Act, 1875, sec. 4.

[6] Entail Amendment Act, 1848, sec. 3; Entail Amendment Act, 1875, secs. 4 and 5 (3); Entail (Scotland) Act, 1882, sec. 3.

[7] Entail Amendment Act, 1848, sec. 3; Entail Amendment Act, 1875, secs. 4 and 5 (3); Entail (Scotland) Act, 1882, sec. 3.

(iii.) the consents of the three nearest heirs who at the said dates are for the time entitled to succeed to the entailed estate in their order successively immediately after such heir in possession;[1] Provided that the nearest heir of entail after the heir in possession shall be 21 years of age and not subject to any incapacity.[2]

Where any heir of entail whose consent is necessary is under age or subject to any legal incapacity, the Court may appoint a *curator ad litem* to such heir, and such *curator ad litem* may give consent on his behalf;[3] but such consent will not be received or acted on where the heir of entail, being of sound mind and above the age of 14 years, enters appearance and opposes the reception of such consent on his behalf.[4] A *curator ad litem* does not incur any responsibility on account of such consent unless he has acted corruptly.[5]

Where an heir of entail in possession or the heir apparent shall have secured by obligation in a marriage contract entered into prior to 18th August, 1882, the descent of the entailed estate upon the issue of a certain marriage, neither the heir of entail in possession nor the heir apparent may apply for or consent to the disentail of such estate until there shall be born a child of such marriage capable of taking the estate in terms of such contract, and who by himself or his guardian shall consent to such disentail, or until such marriage is dissolved without such child being born, unless the trustees named in such contract, or the party or parties at whose sight the provisions of the contract are directed to be carried into execution shall concur in such application or consent.[6]

[1] Entail Amendment Act, 1848, sec. 3; Entail Amendment Act, 1875, secs. 4 and 5 (3); Entail (Scotland) Act, 1882, sec. 3.

[2] Entail Amendment Act, 1848, sec. 3; Entail Amendment Act, 1875, sec. 4.

[3] Entail Amendment Act, 1848, sec. 31; Entail (Scotland) Act, 1882, sec. 12.

[4] Entail Amendment Act, 1853, sec. 18.

[5] Entail Amendment Act, 1848, sec. 31; Entail (Scotland) Act, 1882, sec. 12.

[6] Entail (Scotland) Act, 1882, sec. 17; *Scott Douglas, &c., Petitioners*, 1883, 10 R. 952; *Pringle* v *Pringle*, 1891, 18 R. 895.

The birth of a nearer heir after the presentation of the petition but before the completion of the consents necessary at the date of the presentation of the petition destroys the title,[1] but not where the full consents have been obtained and the first deliverance has been obtained.[2]

Consents may be given in course of the application to the Court.[3] Consents must be in writing and are irrevocable.[4]

The question of *heir apparency* is discussed in the undernoted case.[5]

(*j*) *Form of Consent.*—All consents required by the Act 11 & 12 Vict. cap 36, to instruments of disentail, deeds of conveyance or security, leases, feus, or excambions of any entail estate, or part thereof, or the disposal of any money, or of other property, real or personal, invested in trust for the purpose of purchasing land to be entailed, or of land directed to be entailed, or any other act or deed to which the statute requires consent, shall be in the form, or as nearly as may be in the form, of the following schedule:—

I, *A. B.* (*state the designation and place of abode of the party, and whether he is in minority, or of full age, or that he is of the age of twenty-five, if that be requisite*), the heir next in succession, being heir apparent of *F. G.* (*name and designation*), the heir (*or* institute *as the case may be*) in possession (*or in whatever character the consent is granted here set it forth; and if granted by more than one heir, state their names and other particulars as above; and if it is granted by or with the consent of the guardians, one or more, of a pupil or minor, or incapable person, state the name, designation, place of abode, and character or office of every such guardian, and the name and other particulars, as above, of the pupil or incapable person*), under a deed of entail dated

[1] *Shand, Petitioner*, 1876, 3 R. 544.
[2] *Douglas* v *Campbell*, 1885, 12 R. 916.
[3] Entail Amendment Act, 1875, sec. 5 (1).
[4] Entail Amendment Act, 1848, sec. 50.
[5] *Stewart Mackenzie* v *Lady St. Helier*, 1906, 14 S.L.T. 448.

(*here set forth the date of the entail, and if recorded in the Register of Tailzies, the date of registration*), executed by the now deceased *C. D.* of E., in favour of (*here insert the destination*)[1] of All and Whole (*here insert the leading name of the estate, or a general description of the same, and state the county or counties in which the same is situated*), do hereby consent to the disentail[2] by the said *F. G.* of the whole lands, estate, and others contained in the said deed of entail (*or if the consent applies to a party only*, say, "of the following parts of the said lands "and others contained in the said deed of entail," *and then proceed to describe them particularly*), and that in the form and manner authorised by an Act of the 11 & 12 Vict. cap. 36 intituled "An Act for the "amendment of the law of entail in Scotland." (*If the consent is given under the 4th section of the statute, and subject to conditions, limitations, or restrictions, which the party consenting wishes to insert in the deed of consent, insert such conditions, limitations, or restrictions here.*) And I consent to the registration hereof for preservation. In witness whereof (*add a testing clause in legal form*).

(*Signature of party or parties.*)[3]

_____ *Witness.*

_____ *Witness.*

(*k*) *Dispensing with Consent.*—Where an heir of entail whose consent is required refuses or fails to give his consent, the fact is stated in a petition or in a separate minute and intimation made to such heir. The Court will then proceed to ascertain, by remitting to an actuary,[4] the value in money of the expectancy or interest in the entailed estate of such heir, and in doing so it is relevant to enquire into averments that

[1] In a deed of consent by a next heir, it is not necessary to set forth the destination under which the entail is held, provided the destination be referred to as set forth in the deed of entail duly recorded in the register of tailzies or in any deed so recorded and forming part of the progress of titles to the lands—*M'Lagan, Petitioner*, 1896, 34 S.L.R. 18.

[2] If the deed of consent applies to a deed of conveyance or security, an excambion, a lease, or a feu, or the disposal of trust money, or other property directed to be entailed, or any other act or deed to which the statute requires consent, the necessary alteration will be here made, stating, shortly, the nature of the proposed transaction.

[3] C.A.S., C. V. 2.

[4] *De Virte* v *Wilson*, 1877, 5 R 328.

he has suffered from ailments which have reduced his prospect of life below the average.[1] Expectances are usually valued as at the date of the execution of the instrument of disentail.[2] On such value being ascertained to the satisfaction of the Court, the latter will direct the sum so ascertained to be paid into bank in name of such heir, or that proper security be given over the entailed estate, and the value in money being so paid or secured the Court will dispense with the consent of such heir and proceed as if such consent had been obtained.[3] These conditions must be strictly carried out.[4] If proper security cannot be given by the disentailing heir the money must be paid into bank.[5]

Where an heir whose consent is necessary is absent from Scotland or has disappeared, the petitioner must make an affidavit that such consent cannot be obtained by reason of such absence or disappearance, and the Court, after such enquiry as it may think fit and being satisfied of the truth of the statements in the affidavit, shall ascertain the value in money of the expectancy or interest of such heir and deposit the money in the bank or invest it; and thereupon the Court will dispense with such consent.[6]

(*l*) *Schedule of Debts.*—In any application for authority to disentail an estate in whole or in part, it shall be sufficient that, in lieu of lodging an affidavit, a schedule shall be produced, signed by the petitioner and deponed to by him as correct, setting forth that there are no entailer's debts or other debts, and no provisions to husbands, widows, or children, affecting or that may be made to affect the fee of the estate or the heirs of entail that are not secured by having been placed on record; or if there are any such debts or provisions that are not so secured the amounts or sums thereof in figures, the dates when the same were con-

[1] *M'Donalds* v *M'Donald*, 1880, 7 R. (H.L.) 41; *Tait* (*Somervell's Factor*), 1905, 13 S.L.T. 441.

[2] *Pringle* v *Pringle*, 1892, 19 R. 926; *Stewart Mackenzie* v *Lady St. Helier*, 1906, 14 S.L.T. 448; *cf. Tait* (*Somervell's Factor*), 1905, 13 S.L.T. 441.

[3] Entail Amendment Act, 1875, sec. 5; Entail (Scotland) Act, 1882, sec. 13.

[4] *Baird* v *Baird*, 1891, 18 R. 1184.

[5] *Farquharson, Petitioner*, 1886, 14 R. 231.

[6] Entail (Scotland) Act, 1882, sec. 15.

stituted, and the names and designations or residences of the parties who at the date of the application are in right of the same.[1]

The following is a form of schedule where there are debts:—

Schedule of Debts and Provisions affecting, or that may be made to affect, the fee of the entailed lands and estate of in the County of in the possession of , deponed to by him and produced in terms of the Entail Amendment (Scotland) Act, 1875, section 12, sub-section 5, in an application presented on or about to the Lords of Council and Session for Authority to disentail said lands and estate.

At on the , in presence of one of His Majesty's Justices of the Peace for the County of Compeared the said who, being solemnly sworn and examined, depones that the Schedule of Debts annexed hereto, and signed by the deponent and the said justice as relative hereto, is correct; and further that there are no entailer's or other debts, and no provisions to husbands, widows, or children, affecting or that may be made to affect the fee of the said entailed lands and estate, or any part or portion thereof, or the heirs of entail therein, other than those set forth in the said schedule, and that are not secured by having been placed upon the record. All which is truth, as the deponent shall answer to God.

Sworn at
in the County of
this day of
19 before me.
(Signature of J.P.)

(*Signature of deponent.*)

Schedule referred to in foregoing Affidavit.

Amount. (*Here describe the various obligations.*)	Name and designation of creditor.

(*Signature of deponent.*)
(*Signature of Justice of the Peace.*)

[1] Entail Amendment Act, 1875, sec. 12 (5).

(*m*) *Date of Entail.*—For the purposes of the Entail Acts the date at which the Act of Parliament, deed, or writing directing land to be entailed, first came into operation shall be held to be the date of any entail to be made in execution of the trust, whatever be the actual date of such entail.[1]

Where under the directions of a trust deed which came into operation in 1842 certain lands were entailed, and in 1873 a private Act was obtained under which parts of the land were sold and others purchased in substitution therefor and entailed on the same series of heirs and under the same conditions and prohibitions, the date of the entail of the lands purchased in terms of the private Act was held to be the date of the private Act and not of the original entail.[2]

(*n*) *Amendment of Petition.*—A petition may be amended by the authority of the Court, which has an absolute discretion with regard to making intimation, service, or advertisement of new in respect of such amendment,[3] but this provision should not be made a ground for allowing irregularities to be committed.[4] Instances of cases where amendment has been granted and refused may be found in Duncan's Summary Entail Procedure, p. 245 *et seq.* See also *supra*, p. 102.

(*o*) *Death of Petitioner.* See *Who may Petition, supra*, p. 148.

(*p*) *Disappearance of Heir in Possession.* See *Who may Petition, supra*, p. 147 *et seq.*

(*q*) *Who may Oppose.*—Any heir of entail whose consent is necessary and who refuses or fails to give his consent may oppose; and any heir above 14 years of age and of sound mind, to whom the Court has appointed a *curator ad litem* who has given his consent on behalf of said heir, may enter appearance and oppose notwithstanding the consent of said *curator ad litem.*[5]

[1] Entail Amendment Act, 1848, sec. 28; *Fraser* v *Lord Lovat*, 1852, 14 D. 916; *Black* v *Auld*, 1873, 1 R. 133; *Buchanan* v *Jameson*, 1883, 10 R. 809; *Earl of Mansfield* v *Lord Scone's Tutor*, 1908, S.C. 459.

[2] *Morison* v *Morison's Curator*, 1912, S.C. 1117.

[3] Entail Amendment (Scotland) Act, 1853, (16 & 17 Vict. cap. 94), sec. 3. See also *Lord Wharncliffe, Petitioner*, 1852, 24 Jur. 553.

[4] *Earl of Kintore, Petitioner*, 1856, 18 D. 725, per L.P. M'Neill, 726.

[5] Entail Amendment Act, 1853, sec. 18.

Where a trustee in bankruptcy presents a petition to disentail the entailed estate of the bankrupt, the latter may oppose;[1] and the creditor of an heir apparent who has obtained an advance of money from said creditor on the security of his right of succession to the entailed estate may oppose.[2]

(*r*) *Party not Called Desiring to Appear.*—The Court may permit any person not called as a respondent to appear in the process for his interest.[3] See *Compearer, supra*, p. 104.

(*s*) *Remit.*—There must always be a remit to a man of business. His duty is to report upon the facts stated in the petition and whether the proper procedure has been adopted and the provisions of the Entail Acts have been complied with.

If consents are necessary and are refused a remit to an actuary must be made.

Where a valuation of the entailed estate, or anything of a like nature, is required, a remit is made to a man of skill.

In the interlocutor making the several remits the Lord Ordinary usually recommends the actuary and the man of skill to consult with the man of business before completing their respective reports.

(*t*) *Signature of Instrument of Disentail.*—Where the heir of entail in possession is resident in this country, the instrument of disentail must be signed by him in presence of a notary public.[4] Where the heir in possession is abroad in Europe, his signature in presence of a foreign notary public may suffice, but it is advisable to obtain in addition "the signature "of a Maire, or some proof of the party being a "notary."[5] The execution of a deed of disentail in presence of a British Consul has been held to be sufficient.[6]

(*u*) *Procedure.*—The petition is printed, boxed, and lodged

[1] *Somervell's Trustee* v *Somervell*, 1907, S.C. 528.
[2] *Hepburn* v *Davis*, 1868, 6 M. 1094.
[3] Entail (Scotland) Act, 1875, sec. 12 (4).
[4] Entail Amendment Act, 1848, sec. 32 and Schedule.
[5] *Cuninghame, Petitioner*, 1850, 12 D. 743, per L.J.C. Hope.
[6] *Cuninghame, Petitioner, supra.*

in the Bill Chamber in the ordinary way, and appears on the following morning in the Bill Chamber Motion Roll of the Junior Lord Ordinary under the heading "First Enrolments," when an order for intimation, advertisement, and service on the next three heirs of entail is taken and also an order for answers. After intimation, advertisement, and service have been made and the *inducicæ* have expired, the print of the petition with the deliverance certified by the Clerk, which was the warrant for service, should be lodged in process, having annexed thereto the execution or the acceptance of service (as the case may be) along with a certificate from the petitioner's agent that intimation, advertisement, and service have been made as ordered, and that the *inducicæ* have expired. Newspapers containing the advertisements are also lodged.

If no answers have been lodged, the fact should be included in the certificate of the petitioner's agent, and the petition is then enrolled for the next order which is to remit to a reporter or reporters.

If answers are lodged, the petition and answers are either sent to the roll for discussion or are remitted to a reporter or reporters to deal with them and to report.

Before enrolling for a remit, the petitioner's agent should lodge in process the deed of entail, service, &c., and any other title or document mentioned in the petition, and also the Schedule of Debts and a certificate by himself testifying that the statements made in the petition regarding the petitioner and his three next heirs are correct. At this stage, whether answers have been lodged or not, the Lord Ordinary will appoint a separate *curator ad litem* to each of the next heirs who are under age or are suffering from incapacity.[1] It is not usual to make the appointment at the same time as intimation and advertisement is ordered, but only at this stage. The *curator ad litem* on his appointment attends before the Lord Ordinary and takes the declaration *de fideli*,

[1] *Inglis, Petitioner*, 1855, 17 D. 1005.

and after examining the process lodges a minute expressing his approval or disapproval, or stating that "at the present stage he has no remarks to "make."

Where consents are necessary and are refused, remits are made (i.) to an actuary to ascertain the value in money of the expectancy or interest of the heirs who refuse their consents; and (ii.) to a man of business to see whether the statutory provisions have been complied with; and in the interlocutor making the remits the Lord Ordinary usually recommends the actuary to communicate with the man of business before completing his report.

Where consents are unnecessary, or, being necessary, have been given, the latter remit alone is made.

At this stage the *curator ad litem* to any minor heir is allowed to see the process, and after examination he lodges a minute with any remarks he may have to make. Therefore, the whole process, so far as borrowable, is borrowed up and sent to the reporter.

When the reporter has drafted his report, he should submit it to the *curator ad litem*, who thereafter lodges another minute in process with his remarks thereon. When the report is ready the whole process should be returned along with the report. The Petition is then enrolled and the report is borrowed up and sent to the Lord Ordinary the night before the Petition appears on the roll.

Where consents are unnecessary, or being necessary consents have been given, the Lord Ordinary then grants authority to disentail in terms of an interlocutor suggested in the report of the man of business. Where consents are necessary and have been refused, before said interlocutor is pronounced the petitioner must have first consigned in bank in name of each heir the value in money of his expectancy or interest as ascertained by the actuary. If difficulties are raised in the report, these difficulties are first discussed before the Lord Ordinary. An instrument of disentail is then executed before a notary public at

the sight of the man of business, who lodges a second report which along with the executed instrument of disentail is lodged in process. Therefore a final interlocutor is pronounced in which the Lord Ordinary approves of the instrument of disentail and ordains the Keeper of the Register of Entails to record it. On the expiry of eight days the process may be transmitted for extract. The interlocutor granting authority to disentail should be extracted in duplicate —one extract being for the Keeper of the Register of Entails as his warrant to record the instrument of disentail, and the other to be recorded in the Register of Sasines.

(*v*) *Expenses.*—In every application it shall be competent to decern for payment of expenses of process against any of the parties to the proceedings, or to decern for payment thereof out of the entailed estate concerned or out of the money consigned under the application.[1] *See* Maclaren on Expenses, p. 338 *et seq.*

(*w*) *Review.*

(i.) *Reclaiming Note.* See *supra*, p. 120.

(ii.) *Reduction.*—No interlocutor, judgment, or decree following upon an entail petition is reducible upon the ground of want of compliance with the Entail Acts or Acts of Sederunt in so far as these deal with the matters to be set forth in such a Petition, the intimation and service, and advertisement thereof, the persons to be called as parties thereto, and the mode of calling them, the making and producing of affidavits therein, the matters to be set forth in such affidavits, and generally the procedure under such a Petition; provided that no injury shall have been suffered by any person through such want of compliance; provided also that the proper consents have been obtained, the Petition has been served upon any party expressly required by statute to be called in the Petition, and the interlocutor does not go beyond the prayer of the Petition.[2]

[1] Entail (Scotland) Act, 1875, sec. 12 (6).

[2] Entail Amendment Act, 1853, sec. 1.

All deeds granted under the Entail Acts and all judgments and decrees pronounced in Entail Petitions, where the judgment has not been brought under review of the House of Lords or under reduction on any relevant ground during the period of such review (now *one* year) are secure against challenge in so far as regards third parties acting *bona fide* thereon.[1] They may, however, be reduced on the ground of fraud or essential error.[2]

(*x*) *Vacation.*—All applications under the Entail Acts are addressed to the Court, but during any vacation or recess of the Court are presented to the Lord Ordinary officiating on the Bills, who has all jurisdictions, powers, and authorities necessary for dealing with the same.[3]

Where an Entail Petition has been dealt with and disposed of during vacation, the interlocutor disposing of the Petition must be reclaimed against within eight days,[4] and when these reclaiming days expire during vacation, the reclaiming note must be presented on the first box day occurring in said vacation after the reclaiming days have expired; and if there be no such box day, then on the first ensuing sederunt day.[5]

Where the Petition has been heard during session, but the interlocutor deciding the merits has been signed in vacation, section 94 of the Court of Session Act, 1868, applies.[6]

(3) *Petitions to Sell Entailed Estate.*

(*a*) *Petition to Sell Unconditionally or Subject to Consenter's Conditions.*—An heir of entail in possession may sell the entailed estate and acquire the proceeds unconditionally or subject to the conditions laid down by the consenters, if any, with the same consents and with the same right to dispense with

[1] Entail Amendment Act, 1848, sec. 38; Entail Amendment Act, 1853, sec. 24; Entail Act, 1882, sec. 29; *Viscount Fincastle* v *Earl of Dunmore*, 1876, 3 R. 345.

[2] *Menzies* v *Menzies*, 1890, 17 R. 881; 1893, 20 R. (H.L.) 108.

[3] Entail Amendment Act, 1875, sec. 12 (1).

[4] *Staig* v *Johnston*, 1875, 2 R. 701.

[5] C.A.S., D. I. 4.

[6] *Grant Suttie's Tutors* v *Viscountess Dalrymple*, 1883, 11 R. 3.

consents as in a Petition for disentail.[1] The procedure in this Petition is similar to the procedure in a Petition for disentail, with this exception that the application may be made by a guardian on behalf of an heir in possession who is a minor or under disability, in which case the Court must be satisfied that such sale is for the benefit of the heir by whom or on whose behalf the application is made.[2]

(*b*) *Petition to Convert Entailed Estate into Money to be held Subject to the Fetters of the Entail.*—It is lawful for the heir of entail in possession of any entailed estate, or where an entailed estate consists of land held in trust for the purpose of being entailed for the person who if the land had been entailed would have been the heir in possession, or for the tutors, curators, or administrators of such heir or other person, to apply to the Court for an order of sale of the estate, or part of it.[3]

The procedure appropriate to a Petition for disentail is appropriate to this Petition with the following conditions:—

The Petition may be presented by or on behalf of a married woman, minor, pupil, or other person under disability, but the Court must be satisfied before making an order for sale that it will be for the benefit of the petitioner.[4]

Intimation must be made on the heirs of entail whose consents would have been required to an application for disentail, and to the creditors, if there be any, and such heirs and creditors are entitled to appear for the purpose of seeing that their respective interests are protected, but shall not be entitled to oppose the application.[5]

The petitioner must produce and depone to a schedule signed by him, or his tutors, curators, or

[1] Entail Amendment Act, 1848, sec. 4; Entail Amendment Act, 1875, sec. 5; Entail (Scotland) Act, 1882, secs. 4 and 13; *Scott Plummer, Petitioner*, 1885, 12 R. 1349. See also *Macdonald* v *Lindsay*, 1857, 19 D. 506, per L.P. M'Neill, p. 511.

[2] Entail Amendment Act, 1882, sec. 11.

[3] Entail (Scotland) Act, 1882, sec. 19; *Bowman Ballantine, Petitioner*, 1883, 10 R. 1061.

[4] Entail (Scotland) Act, 1882, secs. 19 and 21.

[5] *Ibid.*, sec. 20.

administrators, setting forth the debts and charges affecting the estate.[1]

The Court is directed to procure a report as to the value of the estate, and as to the rights and charges affecting it, and shall, unless it appear that any patrimonial interest would be injuriously affected thereby, order the estate, or a part of it, to be sold in such manner as the Court thinks proper.[2]

The sale may be by public auction or by private bargain, but the petitioner or the next heir has a right to intimate within one month after the date of the order for sale that he desires the sale to be by public auction.[3] In order to obviate the delay of one month, a minute by the next heir agreeing to a sale by private bargain is sometimes lodged with the Petition.

The price is paid into a bank on a consignation receipt subject to the future orders of Court, or the equivalent in consolidated stock of the United Kingdom may be transferred into a special account to be opened in name of the Accountant of Court. If the estate is encumbered, the debts secured on the estate must be paid and the surplus invested in consolidated stock, or such other stock as the Court may approve, or the price or surplus (as the case may be) may be applied in the purchase of other lands which are settled according to the subsisting destination, or in payment of the cost of improvements executed but not charged on the entailed estate, or any other estate belonging to the petitioner and entailed on the same series of heirs.[4]

The expenses of the Petition, in so far as the same properly affect the capital of the estate form a deduction from the price paid into bank or invested.[4]

No consents are necessary.

By the Tenures Abolition Act, 1746 (20 Geo. II. cap. 50), and the Sale to the Crown Act, 1746 (20 Geo. II. cap. 51), special power is given for the sale

[1] Entail (Scotland) Act, 1882, sec. 20.
[2] *Ibid.*, sec. 21.
[3] *Ibid.*, sec. 22.
[4] *Ibid.*, sec. 23.

of entailed estates to the Crown, and the purchase money must be applied in payment of the entailer's debts or other debts made effectual burdens on the estate, not being contracted by the vendor himself, or laid out and settled to the same uses and with the same limitations and restrictions as such land was settled before such sale to the Crown.

(c) *Petition to Sell Estate in Payment of Entailer's Debts or other Debts made Chargeable on the Fee of the Estate.*—This Petition is regulated by the Entail Amendment Act, 1848, sec. 25; Entail Amendment Act, 1853, sec. 9; and the Entail Amendment Act, 1868, secs. 9-11, and includes Petitions to sell where estate duty has been made a charge on the fee of the estate by the Finance Act, 1894.[1]

The form of the Petition and the procedure thereon is, as nearly as may be, similar to the form and procedure prescribed with reference to Petitions presented to the Court for disentail.[2] Guardians, however, may apply.[3]

No consents are necessary.[4]

(4) *Petitions to Excamb.*—A Petition may be presented to the Junior Lord Ordinary by an heir of entail in possession *without consents* for authority to excamb a portion of an entailed estate extending to not more than one-fourth in value, and not including the principal mansion house or office, or the garden, park, lawn, home farm, or policy, for other lands lying contiguous to the same, or to some other part of the entailed estate, or being convenient to be holden therewith.[5]

A Petition may be presented to the Junior Lord Ordinary by an heir of entail in possession, being of full age, under an old or a new entail for authority to excamb in whole or in part *with the following consents:*—

(i.) With the consent of the whole heirs of entail if there be less than three in being at the date of such

[1] *Laurie, Petitioner*, 1898, 25 R. 636; *Callander-Brodie, Petitioner*, 1904, 12 S.L.T. 474; *Lord Advocate* v *Earl of Moray's Trustees*, 1905, 7 F. (H.L.) 116.

[2] Entail Amendment Act, 1868, sec. 9.

[3] Entail (Scotland) Act, 1882, sec. 11.

[4] *Riddell, Petitioner*, 1853, 15 D. 904.

[5] Rosebery Act, 1836 (6 & 7 Will. IV. cap. 42), secs. 3, 4, 5 and 6; Entail Amendment Act, 1848, secs. 33 to 37; Entail Amendment Act, 1875, sec. 12.

consents, and at the date of presenting the Petition; or

(ii.) with the consent of the three nearest heirs who at the said dates are for the time being entitled to succeed to such estate in their order successively immediately after such heir in possession; or

(iii.) with the consent of the heir apparent under the entail, and of the heir or heirs in number not less than two, including such heir apparent, who in order successively would be heir apparent.[1]

The Petition may be presented by the tutor, curator, or other legal guardian of a pupil or minor, or person under legal incapacity;[2] and consents may be given through the medium of a *curator ad litem* appointed by the Court to such pupil, minor, or person under legal incapacity.[3]

The procedure is similar to the procedure in a Petition to disentail, with the exception that minors and guardians may petition.

It is imperative that the Petition should set forth the infeftment.[4] Where consents are necessary, it is sufficient that the deed of consent should set forth the leading name of the estate, with a general description of the same and the county in which the portion of the estate proposed to be excambed lies, and it is unnecessary to set forth the counties within which the parts of the estate not proposed to be included in the excambion are situated.[5]

(5) *Petitions for Authority to Grant Feus and Leases.*—By the Montgomery Act, 1770,[6] and the Rosebery Act, 1836,[7] certain powers are given to grant leases of entailed estates, but the consent of the Court is not required to the exercise of these powers.

The heir in possession of an entailed estate, being of full age, may present a petition to the Junior Lord Ordinary for authority to feu or lease said estate in whole or in part with the like consents, if any, as would entitle him to disentail.[8] Accordingly,

[1] Entail Amendment Act, 1848, sec. 5; Entail Amendment Act, 1868, sec. 18.

[2] Entail Amendment Act, 1875, sec. 12 (2); Entail (Scotland) Act, 1882, sec. 11.

[3] Entail (Scotland) Act, 1882, sec. 12.

[4] *Lord Wharncliffe, Petitioner*, 1852, 24 Jur. 553.

[5] *Marjoribanks, Petitioner*, 1852, 14 D. 935.

[6] 10 Geo. III. cap. 51, secs. 1-8.

[7] 6 & 7 Will. IV. cap. 42, secs. 1 and 2.

[8] Entail Amendment Act, 1848, sec. 4; Entail Amendment Act, 1875, secs. 5 and 6; Entail (Scotland) Act, 1882, sec. 4.

an heir of entail in possession may be granted by the Court authority to feu or lease the entailed estate at such times, in such portions, and for payment of such feu duties or rents, as the petitioner may think fit, subject to the conditions imposed by the heirs, if any, whose consents are necessary.[1]

An heir of entail in possession under an old or a new entail may apply without consents to the Court for power to grant feus or *long leases* of not more than one-eighth part in value of the whole estate for the highest feu duty or rent that can be got for them, but there must be no *grassum*;[2] and the Court may fix minimum rates of feu duty or tack duty and approve of model charters,[3] which can only be altered by a minute under the original petition.[4] A "long lease" denotes not only leases for such periods as to be virtual alienations, but leases of entailed lands exceeding in duration acts of ordinary administration.[5] The heir in possession must be infeft, at least in the parts to which the petition relates,[6] and he may petition notwithstanding that his life interest has been sold and the purchaser infeft under a decree of ranking and sale,[7] or that his title as heir of entail in possession is under appeal to the House of Lords.[8] Where authority to feu parts of several lands entailed in separate deeds to the same heirs was asked, the Lord Ordinary granted authority to feu more than one-eighth of one estate where the total to be feued was less than one-eighth of the whole.[9]

Feus or leases may be granted of a portion of an entailed estate not exceeding two acres for a scientific purpose, or other purpose of public utility, and the Court, if satisfied that it would be for the public advantage and not prejudicial to the estate, may grant such authority for such yearly feu duty or rent as may be agreed upon, though inadequate and below the just value, snbject to such conditions as the Court may think fit;[10] and the authority given to the heir in possession is available to succeeding heirs.[11]

[1] *Scott Plummer, Petitioner*, 1885, 12 R. 1349; *Christie, Petitioner*, 1888, 15 R. 793; *Lockhart, Petitioner*, 1901, 8 S.L.T. 505; *Cromartie, Petitioner*, 1909, 2 S.L.T. 19.

[2] Entail Amendment Act, 1848, sec. 24; Entail Amendment Act, 1853, sec. 13.

[3] Entail Amendment Act, 1853, sec. 6.

[4] *Earl of Kinnoull, Petitioner*, 1862, 24 D. 379.

[5] *Farquharson, Petitioner*, 1870, 9 M. 66.

[6] *Earl of Stair, Petitioner*, 1852, 1 Stuart, 578.

[7] *Gordon, Petitioner*, 1851, 14 D. 114.

[8] *Livingstone, Petitioner*, 1858, 20 D. 1231.

[9] *Duke of Portland, Petitioner*, 1909, 1 S.L.T. 72.

[10] Entail (Scotland) Act, 1882, sec. 6 (2).

[11] *Ibid.*, sec. 6 (3).

An application to the Court for authority to feu or lease may be made by a minor with consent of his curator, by tutors for a pupil, or by a curator or other administrator for a person otherwise incapacitated, but the Court must be satisfied that the application is for the benefit of the heir in possession.[1]

The procedure in this petition is similar to the procedure in a petition for disentail with the exception that minors with the consent of their curators, and guardians of persons under disability, may petition.[2]

(6) *Petitions to Charge Debt.*—An heir of entail in possession who desires to borrow money on the security of the entailed estate may present a petition to the Court with the like consents, if any, as would enable him to disentail, for authority to charge the entailed estate with such borrowed money unconditionally or subject to the conditions contained in such consents.[3]

The procedure in this petition is similar to the procedure in a petition to disentail, with the exception that a minor with consent of his curator and a guardian on behalf of a pupil or person otherwise under disability, may petition.[4]

(7) *Petitions to Charye Improvement Expenditure.*—Every proprietor of an entailed estate laying out money on "Mont-"gomery improvements" is made a creditor to the succeeding heirs of entail for three fourths thereof, provided the same do not exceed four years free rent after deduction of burdens.[5] This may be done—

(i.) by setting up a rent charge on the estate subsequent to the death of the heir-disburser;[6] or,

(ii.) the heir-disburser may obtain the authority of the Court to grant during his lifetime a bond of annual rent so as to extinguish the debt twenty-five years after the date of his death in the case of old improvements,[7] and twenty-five years after the date of the decree of constitution in case of *new* improvements,[8] and this whether the heir-disburser has or

[1] Entail (Scotland) Act, 1882, sec. 11.
[2] *Ibid.*
[3] Entail Amendment Act, 1848, sec. 4; *Macdonald* v *Lindsay*, 1857, 19 D. 506, per L.P. M'Neill, 511.
[4] Entail (Scotland) Act, 1882, sec. 11.
[5] 10 Geo. III. cap. 51, secs. 9 to 31 (the Montgomery Act, 1770).
[6] *Ibid.*, sec. 15.
[7] 11 & 12 Vict. cap. 36 (the Rutherford Act), sec. 13; Entail (Scotland) Act, 1882, sec. 4.
[8] 11 & 12 Vict. cap. 36, sec. 14; Entail (Scotland) Act, 1882, sec. 4.

has not obtained decree therefor in terms of the Montgomery Act.[1] A bond and disposition in security may be substituted for the bond of annual rent;[2] and where at least one-fourth of a capital sum borrowed for improvements upon the security of a terminal charge has been defrayed by the heir in possession, the latter may grant a bond and disposition in security for the balance without consents and irrespective of the date at which the improvements were charged.[3]

The list of improvements set forth in the Montgomery Act, 1770, has been largely added to,[4] and an heir of entail in possession may petition the Court for authority to borrow money to defray the cost of such additional improvements (i.) where they have been executed within twenty years of the date of the Petition, or are in course of execution, or are merely contemplated by him at the date of the Petition, and (ii.) where such heir has paid the cost of such improvements or is liable for the same so far as unpaid;[5] and for this purpose the heir in possession may grant a bond of annual rent for twenty-five years from the date of the authority of the Court being granted, or a bond and disposition in security for three-fourths of the sum on which the amount of such bond of annual rent, if granted, would be calculated.[6] Before granting the Petition the Court must be satisfied that the improvements already executed are of a substantial nature and beneficial to the estate as at the date of the Petition;[7] that the improvements in course of execution, or contemplated, will be substantial and beneficial when completed;[8]

[1] 11 & 12 Vict. cap. 36, sec. 16; Entail Amendment Act, 1868, sec. 18.

[2] 11 & 12 Vict. cap. 36, sec. 18; Entail (Scotland) Act, 1882, sec. 6 (1).

[3] Entail (Scotland) Act, 1882, sec. 6 (4).

[4] Entail Amendment Act, 1875, sec. 3.

[5] *Ibid.*, sec. 7; Entail Amendment Act, 1878, sec. 3; Entail (Scotland) Act, 1882, secs. 4 and 6 (1).

[6] Entail Amendment Act, 1875, sec. 8; Entail (Scotland) Act, 1882, secs. 4 and 6 (1); *Cadell, Petitioner*, 1897, 34 S.L.R. 640; *Murray Stewart, Petitioner*, 1898, 36 S.L.R. 623.

[7] Entail Amendment Act, 1875, sec. 7 (1); *Fogo, Petitioner*, 1877, 5 R. 319; *Blair Maxwell, Petitioner*, 1893, 1 S.L.T. 323.

[8] Entail Amendment Act, 1875, sec. 7 (2).

and that the amount to be borrowed for improvements in course of execution, or contemplated, is reasonable.[1] The Court may remit to a man of skill to make estimates.[2] No vouchers need be produced unless called for by the Court or its reporter.[3]

The cost of the Petition and obtaining the loan and security may be added to the sum to be borrowed.[4] When the Petition is for authority to borrow money on the security of the estate to defray the cost of improvements executed prior to the date of the Petition, the process is at an end on the Court granting the prayer of the petition; in every other case the process subsists as a depending process until the whole money authorised to be borrowed is paid away under the authority of the Court.[5] In every such case as that last mentioned, the Court in granting authority shall make an order for the consignation in bank of the whole amount of the loan authorised on a receipt payable to the orders of Court, and such order for consignation shall be set forth in the security to be granted by the heir of entail and shall be obligatory on the lender; and thereafter the Court may make such orders and give such directions in the process as they may think necessary from time to time for the inspection of the works of improvement in course of execution, for insuring that the improvements shall be well executed, and may, on motion made in the process, grant orders from time to time for payment out of the consigned money to the applicant, or in the case of his death to his personal representative or other successor entitled thereto and sisted in the process of the cost of the improvements so far as executed to their satisfaction paid for by him or for which he is liable, and of the expenses of the loan and security and of the process.[6]

[1] Entail Amendment Act, 1875, sec. 7 (3).

[2] *Ibid.*, sec. 7 (4).

[3] *Ibid.*, sec. 7 (5).

[4] Where the charge is by bond and disposition in security to the extent of three fourths of the improvement expenditure the charger is only entitled to have included in the bond three fourths of the actual or estimated expenses of the application. *Leith* v *Leith*, 1888, 15 R. 944.

[5] Entail Amendment Act, 1875, sec. 7 (7).

[6] *Ibid.*, sec. 7 (8).

Where an heir of entail in possession, who dies without having charged the entailed estate with the amount which he is entitled to charge of the sums expended on improvements, expressly bequeaths conveys, or assigns to any person such sum or part thereof, such person may petition the Court to ordain the next heir to grant a bond in his favour for such sum over the entailed estate.[1] A general disponee of an heir of entail is not in the position of having "expressly" conveyed to him such a sum of money.[2] Such a sum is *sua natura* heritable.[3]

Where a petitioner elects to proceed under the Acts subsequent to the Montgomery Act, he is held to have abondoned his rights under the latter Act.[4]

Beyond what has been already pointed out, there is no material difference in the procedure in this Petition from the procedure in a Petition for disentail except that a minor with his curator, and the guardian of a pupil or person otherwise under disability, may petition.[5]

(8) *Petitions for Authority to Charge Younger Children's Provisions.*—Among the family provisions which may be made under the authority of the Aberdeen Act, 1824,[6] and which have been held as incorporated in every deed of entail,[7] is one whereby an heir of entail in possession of an entailed estate may make the following provision for children who shall not succeed to such entailed estate out of the free yearly rents or free yearly value of the whole of said estate after deduction of public and other burdens, viz.:—for one child, one year's free rent or value; for two children, two year's free rent or value; and for three or more children, three year's free rent or value.[8]

Provisions for younger children may also be made in virtue of powers contained in the deed of entail itself.

In order that such provisions may be made a charge on the

[1] Entail Amendment Act, 1875, sec. 11; Entail (Scotland) Act, 1882, sec. 4.
[2] *Maxwell, Petitioner*, 1877, 4 R. 1112.
[3] *Earl of Kintore* v *Dowager Countess of Kintore*, 1885, 12 R. 1213.
[4] *Marquess of Breadalbane's Trustees* v *Campbell*, 1868, 6 M. (H.L.) 43.
[5] Entail (Scotland) Act, 1882, sec. 11.
[6] 5 Geo. IV. cap. 87.
[7] *Callander* v *Callander*, 1869, 7 M. 777, per L.P. Inglis at 786.
[8] 5 Geo. IV. cap. 87, secs. 4 and 5.

entailed estate by bond and disposition in security,[1] a Petition must be presented craving the authority of the Court thereto, and in such Petition there shall be set forth in a schedule annexed thereto the specific portion of the estate which it is proposed to include in such bond and disposition in security.[2] Where the security extends over the whole estate such a schedule is unnecessary.[3]

The procedure in this Petition does not differ in any material respect from the procedure in a Petition to disentail.

(9) *Petitions for Authority to Restrict Family Provisions.*—Where the family provisions granted under the authority of the Aberdeen Act[4] exceed the proportions of the rent or value of the entailed estate as are set forth in said Act, such provisions are not null and void, but are voidable to the extent of the excess at the instance of the heir of entail next in the order of succession, or of any other heir of entail who may present a Petition to the Junior Lord Ordinary for that purpose.[5]

There are no peculiarities in the procedure of such Petitions.

(10) *Petitions to Uplift Consigned Money.*—Where entailed lands have been compulsorily acquired under the Lands Clauses Consolidation (Scotland) Act, 1845, or any similar Act of Parliament, the heir of entail in possession may present a Petition to the Court for power to uplift the price of the lands which has been consigned in bank.

The Petition may be either for power to uplift the consigned money and apply it in redemption of the land tax, or the discharge of a debt affecting the entailed lands or other lands entailed on the same series of heirs, or in the purchase of other lands to be so entailed, or in removing or replacing buildings affected by the operations of the purchaser of the entailed lands, or in payment to any party becoming absolutely entitled to such consigned money.[6]

Where the heir in possession could have acquired the entailed estate in fee simple by executing an instrument of disentail, he may Petition the Court for authority to uplift the consigned money and acquire it in fee simple; or if not so entitled he may

[1] Entail Amendment Act, 1848, sec. 21; Entail Amendment Act, 1853, sec. 7.

[2] *Ibid.*, sec. 23.

[3] *Gollan, Petitioner*, 1851, 13 D. 956.

[4] 5 Geo. IV. cap. 87, secs. 4 and 5.

[5] *Ibid.*, sec. 7; 20 & 21 Vict. cap. 56, sec. 4; 38 & 39 Vict. cap. 61, sec. 12 (1); 52 & 53 Vict. cap. 54, sec. 3.

[6] 8 & 9 Vict. cap. 19, sec. 67.

obtain leave to apply the consigned money in improvement expenditure.[1]

The procedure where the heir of entail in possession desires to acquire the consigned money in fee simple is similar to the procedure in a Petition to disentail, including service upon the three next heirs even where the petitioner is entitled to disentail without consents.[2] The application, however, may be made by guardians on behalf of persons under disability.[3]

Where the consigned money is to be applied in improvement expenditure, the procedure is the same as in a Petition to charge improvement expenditure. In one case Lord Pearson suggests that service on the three next heirs may be dispensed with,[4] but the practice is to the contrary effect, and it is only where the Petition to uplift is brought under the Lands Clauses Act, 1845, alone that such service is dispensed with.[5] No consents, or schedule of debts, are necessary.[6]

(11) *Expenses.* *See* Maclaren on Expenses, p. 336 *et seq.*

[1] Entail Amendment Act, 1848, sec. 26.
[2] *Davidson, Petitioner*, 1901, 9 S.L.T. 46.
[3] Entail (Scotland) Act, 1882, sec 11.
[4] *Davidson, Petitioner*, 1901, 9 S.L.T. 46.
[5] *Baird, Petitioner*, 1903, 11 S.L.T. 31.
[6] *Earl of Glasgow, Petitioner*, 1855, 17 D. 1140.

CHAPTER VIII.

PETITIONS RELATIVE TO SEQUESTRATION.[1]

(1) *Generally.*

(*a*) *Jurisdiction.*—Petitions relative to sequestration, when not initiated in the Sheriff Court, are purely Bill Chamber Petitions,[2] except in the case of Petitions for the appointment of judicial factors on the estates of deceased debtors[3] (see *supra*, p. 134) and Petitions for recall where the majority in number and value of the creditors reside in England or in Ireland.[4]

(*b*) *Form of Petition.*—The Petition is addressed to the Lord Ordinary officiating on the Bills and is in manuscript. It may be signed by the petitioner, or his counsel or agent, and the Division of the Court to which the sequestration is appropriated must be marked thereon[5] when lodging.[6]

Where sequestration is craved of separate firms with the same partners they must be sequestrated and wound up as separate estates.[7]

(*c*) *Making up Process.*—The following process is made up when the Petition is presented :—

(i.) An Inventory of Process, which is not marked with a number.

(ii.) Principal Petition.

(iii.) Interlocutor Sheet.

(iv.) Duplicate Inventory of Process.

(v.) Certified Copy Petition.

(vi.) Inventory of Productions produced with the Petition.

[1] It has only been found possible to notice the more important petitions. The petitions omitted will be found in the treatises on Bankruptcy of Goudy and Fyfe.

[2] Bankruptcy (Scotland) Act, 1913, secs. 2, 20, 42; *Scott* v *Anstruther*, 1848, 10 D. 732.

[3] Bankruptcy (Scotland) Act, 1913, sec. 163.

[4] *Ibid.*, sec. 43.

[5] *Ibid.*, sec. 20.

[6] Antonio, p. 359.

[7] *Commercial Bank of Scotland* v *Tod's Tr.*, 1895, 33 S.L.R. 161.

The duplicate Inventory of Process, unlike the Inventory of Process, contains entries of all the productions fully detailed, and as it is the only borrowable record of what has been put into process, it should be kept fully written up to date.

Where in a sequestration the original process is lost, the Court in the exercise of its *nobile officium* may grant authority to proceed in the sequestration and to take all necessary steps for the distribution of the estate.[1]

(*d*) *Caveat.*—A *caveat* in a sequestration is a written note put up in the Bill Chamber in order that intimation may be made by the Bill Chamber Clerk to the person in whose name the *caveat* is lodged of the presentation of a Petition for sequestration. Where a *caveat* has been lodged and a Petition is presented, the party lodging the *caveat* is entitled to be heard before any order is pronounced in the Petition. A *caveat* may be used either by a debtor who anticipates the presentation of a Petition for his own sequestration, or by a creditor who, having presented a Petition for sequestration of his debtor, anticipates that the latter may himself present a competing Petition.

The following is a form of *caveat* at the instance of a debtor:—

"Caveat for A B *(design debtor);* should any "Petition for sequestration be presented praying for "sequestration of the estates of the said A B, inti-"mation is requested to be made to the subscribers, "his agents."

(Signature of Debtor's Agent, with Address and Date.)

A *caveat* is good for a month, after which it may be renewed from time to time by payment of additional fee stamps.

When a *caveat* is lodged by an Edinburgh agent on the instructions of a country agent it is the duty of the latter to furnish the former, as part of his instructions, with information sufficient to enable

[1] *Skirving's Trustee, Petitioner*, 1883, 11 R. 17; *Wilson's Trustee* v *Wilson*, 1899, 1 F. 694.

him to support the *caveat* at any diet that may be fixed; and if he fails in this duty he runs the risk of the *caveat* proving inefficient.[1]

(e) Reclaiming Notes.—Every interlocutor of the Lord Ordinary, which is not expressly excluded from review by the Bankruptcy (Scotland) Act, 1913, may be brought under review by a reclaiming note in common form presented within fourteen days from the date of the Lord Ordinary's interlocutor, and the reclaiming note is sent to the Summar Roll and disposed of as speedily as the forms of Court will allow.[2]

The Court of Session Act, 1868, does not apply to proceedings under the Bankruptcy Acts,[3] and accordingly it is not necessary to obtain leave to reclaim against an interlocutory judgment,[4] nor does a reclaiming note against an interlocutor bring up for review prior interlocutors which have become final.[5]

Where the reclaiming days expire in vacation, recess, or adjournment, the reclaiming note may be presented on the first box day occurring in such vacation, recess, or adjournment after the reclaiming days have expired, or if there is no such box day, on the following ensuing sederunt day.[6]

The Division of the Court to which the Petition is appropriated must be marked on the original Petition,[7] and reclaiming notes from interlocutors on the Petition must be presented to such Division.[8]

In one case, however, where a Petition for sequestration was marked to the First Division, and a Petition for recall was presented to the Lord Ordinary who refused it, and his judgment was reclaimed against to the Second Division, the latter Court refused to throw out the reclaiming note as incompetent, but left open the question of contingency.[9]

As these Petitions are all presented to the Lord

[1] *Stavert, Petitioner*, 1904, 12 S.L.T. 150, per Lord Pearson.
[2] Bankruptcy (Scotland) Act, 1913, secs. 166, 167; *Davis* v *Hepburn*, 1866, 5 M. 80.
[3] *M'George* v *M'George's Creditors*, 1887, 14 R. 841.
[4] *Ibid.*
[5] *Alison* v *Robertson's Trustees*, 1890, 18 R. 212.
[6] *Joel* v *Gill*, 1860, 22 D. 357.
[7] Bankruptcy (Scotland) Act, 1913, sec. 20.
[8] *Gow* v *Bell*, 1862, 1 M. 25.
[9] *Cooper* v *Baillie*, 1878, 5 R. 414.

Ordinary on the Bills,[1] the practice and procedure appropriate to reclaiming notes from interlocutors pronounced on purely Bill Chamber business will be followed.[2] See *supra*, pp. 41, 120.

It is incompetent for the Lord Ordinary to report a sequestration Petition by formal interlocutor for the decision of the Inner House.[3]

(f) Extract Interlocutors.—All extract interlocutors pronounced by the Lord Ordinary or the Court shall be prepared and issued by the Clerk of the Bills in the same manner as extracts were formerly issued under the statute 2 & 3 Victoria, cap. 41.[4]

(2) *Petition at the instance of a Creditor where the Debtor is Alive.*

(*a*) *Form of Petition.*—The Petition is addressed to the Lord Ordinary on the Bills, not to the Court, and the instance shews that it is a Petition by a creditor to the extent required by law of a person named and designed. It then *humbly sheweth* that the petitioner is a creditor of the above named and designed debtor to the extent of a sum which is set forth, conform to oath and bill, or oath, account and relative vouchers, or as the case may be. The fact of the notour bankruptcy of the debtor is then set forth, and that it is within four months of the date of the presentation of the Petition; that he is still notour bankrupt, and that he has within a year of the date of presentation of the Petition resided, or had a dwelling-house or place of business, in Scotland, and is subject to the jurisdiction of the Supreme Courts of Scotland; and that in order to realise his estates for behoof of his creditors the petitioner is under the necessity of applying for sequestration of his estates in terms of the Bankruptcy (Scotland) Act, 1913.

Where the appointment of a judicial factor is also desired, the grounds for the appointment are set forth.

The *prayer* is for a warrant to cite the debtor on such *inducice* as the Lord Ordinary may direct; to direct intimation in the *Edinburgh Gazette;* to grant

[1] Bankruptcy (Scotland) Act, 1913, sec. 2.
[2] C.A.S., E. II. 29, 30.
[3] *Wryghte* v *Lindsay*, 1856, 19 D. 55.
[4] C.A.S., E. II. 27.

diligence to recover evidence of notour bankruptcy and of the other necessary facts; thereafter to award sequestration and appoint a meeting of creditors, and further to remit to the Sheriff of the County of bankrupt's residence, dwelling-house, or place of business.

The name of a judicial factor may be suggested, where a factor is desired.

(*b*) *Conditions Requisite.*—The debtor must be subject to the jurisdiction of the Supreme Courts of Scotland in respect of the possession of heritage in Scotland or by residence in Scotland for forty days continuously.[1] The arrestment of moveables, or reconvention, will not afford sufficient jurisdiction.[2]

The debtor must be notour bankrupt, and must within a year before the presentation of the Petition have resided or had a dwelling-house or place of business in Scotland.[3] The Petition must be presented within four months of the date of the debtor's notour bankruptcy,[4] which may, however, be constituted anew so as to found a Petition for sequestration.[5]

The Petition may be at the instance of any one or more creditors whose debt or debts together amount to not less than £50, whether such debts are liquid or illiquid, provided they are not contingent.[6]

(*c*) *Productions with Petition.*

(i.) *Oath of Verity.*—Where the creditor resides within the United Kingdom an oath taken by him before a Judge Ordinary, Magistrate, Justice of the Peace, Notary Public, or a Commissioner competent to administer oaths in the High Court of Justice in England or Ireland, to the verity of the debt claimed by him, must be produced.[7]

An affirmation may be used instead of an oath.[8]

[1] *Joel* v *Gill*, 1859, 21 D. 929.

[2] *Ibid.*; *Thompson* v *Whitehead*, 1862, 24 D. 331; *Croil, Petitioner*, 1863, 1 M. 509; *Allan* v *Wormser, Harris, & Co.*, 1894, 21 R. 866, per Lord Rutherfurd Clark.

[3] Bankruptcy (Scotland) Act, 1913, sec. 11.

[4] *Ibid.*, sec. 13.

[5] *Ibid.*, sec. 7; *Balfour* v *Pedie*, 1841, 3 D. 612; *Blair* v *North British & Mercantile Insurance Co.*, 1889, 16 R. 947; 1890, 17 R. (H.L.) 76; *Wood* v *Cranston & Elliot*, 1891, 18 R. 382.

[6] Bankruptcy (Scotland) Act, 1913, sec. 12.

[7] *Ibid.*, sec. 21.

[8] 51 & 52 Vict. cap. 46. See also *M'Cubbin* v *Turnbull*, 1850, 12 D. 1123.

Where the creditor is out of the United Kingdom the oath or affirmation may be taken in the country where he resides before a Magistrate, or Justice of the Peace, or other person qualified to administer oaths in such country, and certified to be such by a British Minister, or British Consul, or by a Notary Public; or the creditor's known agent or mandatary in Great Britain or Ireland may make an oath of credulity.[1]

In such oath or affirmation the creditor shall state what other persons, if any, are, besides the bankrupt, liable for the debt or part thereof, and specify any security which he holds over the estates of the bankrupt or other obligants, and depone that he holds no other obligants or securities than those specified; and where he holds no other person than the bankrupt so bound, he shall depone to that effect.[2]

Where the creditor is a corporation, an oath of verity or affirmation made by the secretary, manager, cashier, clerk, or other principal officer of such corporation, shall be sufficient, although the person making the same be not a member of such corporation.[3]

In the case of companies other than a corporation, an oath or affirmation by a partner is sufficient.[3]

Where the creditor is under age or incapable to make oath, an oath of credulity by his authorised agent, factor, guardian, or manager is sufficient.[3]

Where the creditor is illiterate, it is not necessary for him to adhibit his mark; a declaration as to his inability to write inserted in the oath is sufficient.

The oath or affirmation may be made before the notour bankruptcy of the debtor.[4]

A defect in the oath or affirmation cannot be remedied.[5]

[1] Bankruptcy (Scotland) Act, 1913, sec. 22.
[2] *Ibid.*, sec. 21.
[3] *Ibid.*, sec. 24.
[4] *Taylor* v *Little*, 1822, 1 Shaw's App. 254.
[5] Bankruptcy (Scotland) Act, 1913, sec. 20. *Jonas Wolfe, Petitioner*, 1900, 8 S.L.T. 200.

All documents referred to in the oath should be docquetted and subscribed by both the creditor and the magistrate, except in the case of an illiterate person, in which case the magistrate alone subscribes.

(ii.) *Account and Vouchers of Debt.*—The account and vouchers must be in conformity with the debt sworn to in the oath of verity.[1]

If the voucher is a document requiring a stamp it must be stamped.[2]

An account *in re mercatoria* excerpted from the books of the creditor is a sufficient voucher for the debt,[3] but the entries must be specific.[4] In the case of a loan of money,[5] or a cash account,[6] a document of debt is necessary to prove it unless in very exceptional circumstances.

An account current in bankers' books must be certified in terms of the Bankers' Books Evidence Act, 1879.[7]

A prescribed account, though supported by the oath of the creditor, is not a sufficient voucher.[8]

(iii.) *Evidence of Notour Bankruptcy and of Other Facts Necessary to be Established.*—In the case of *individuals*, notour bankruptcy for the purposes of a Petition for sequestration is constituted:—

By insolvency, concurring with

(1) A duly executed charge for payment, where a charge is necessary, followed by the expiry of the days of charge without payment;

(2) Where a charge is not necessary, the expiry without payment of the days which must elapse before poinding or imprisonment can follow on a decree or warrant for payment of a sum of money;

[1] *Clark* v *Thom & Son*, 1884, 11 R. 469.

[2] *Scott* v *Scott*, 1847, 9 D. 1347. See also *Robb* v *Forrest*, 1831, 5 W. & S. 740; *A B, Petitioner*, 1840, 2 D. 1357.

[3] *Knowles* v *Crooks and Balgarnie*, 1865, 3 M. 457.

[4] *Riddell* v *Galbraith*, 1896, 24 R. 51. See also *Ballantyne* v *Barr*, 1867, 5 M. 330.

[5] *Ballantyne* v *Barr*, 1867, 5 M. 330.

[6] *Simpson* v *Myles*, 1881, 9 R. 104, per Lord Fraser (Ordinary).

[7] *Millar* v *Romanes*, 1912, 2 S.L.T. 269 (Sheriff Orphoot); *Bayne, Petitioner*, August, 1912, Lord Hunter (unreported).

[8] *Geddes* v *Reid & Co.*, 1894, 2 S.L.T. 244.

(3) A poinding or seizure of any of the debtor's moveables for non-payment of rates or taxes;

(4) A decree of adjudication of any part of his heritable estate for payment or in security; or

(5) The sale of any effects belonging to the debtor under a sequestration for rent.[1]

In the case of a company notour bankruptcy is constituted either in any of the foregoing ways or by any of the partners being rendered notour bankrupt for a company debt.[2]

Only *prima facie* evidence of notour bankruptcy is required.[3] Accordingly, the extract decree and the execution of the charge thereon; or the extract decree alone; or the execution of poinding; or the extract decree of adjudication; or a certified copy of the report of the sale of the debtor's effects, as the particular case may be, should be produced, if the petitioner has such. But the production of such evidence or of the evidence of other necessary facts is not necessary before the date of the first deliverance. It is sufficient if it is produced at the commission appointed to recover evidence of notour bankruptcy, the authority for which is granted by the first deliverance.[4] Parole evidence of notour bankruptcy will be admitted where the written evidence is destroyed.[5]

Notour bankruptcy must be present at the date of presenting the Petition. Thus, where diligence was sisted on consignation on the morning of the last day of charge,[6] and where a Petition was presented on the last day of charge[7] sequestration was not awarded. If the diligence is attempted to be suspended after the days of charge have expired the sequestration may proceed.[8]

[1] Bankruptcy (Scotland) Act, 1913, sec. 5.

[2] *Ibid.*, sec. 6.

[3] *M'Nab* v *Clarke*, 1880, 16 R. 610; *Aitken* v *Kyd*, 1890, 28 S.L.R. 115.

[4] Bankruptcy (Scotland) Act, 1913, sec. 25; *Hope* v *Macdougall*, 1893, 21 R. 49.

[5] *Drummond* v *Clunas Tiles and Mosaics, Ltd.*, 1909, 1 S.L.T. 508.

[6] *Laird* v *Scott*, 1913, 2 S.L.T. 409.

[7] *Baillie & Son, Petitioners*, 1899, 6 S.L.T. 324.

[8] *Sutherland* v *Sutherland*, 1843, 5 D. 544; *Fleming* v *Yeaman*, 1883, 21 S.L.R. 164; 1884, 21 S.L.R. 722.

Where the defender in a decree in absence had been reponed before the expiry of the *inducice* of the Petition for sequestration an award of sequestration was refused.[1]

(*d*) *First Deliverance.*—The Petition and necessary productions having been lodged, a deliverance thereon is asked for, and if everything is in order, it is granted as a matter of course. It is usually in the following terms:—

"Edinburgh (*Date*). The Lord Ordinary having considered "this Petition, with the writs produced, grants "warrant to macers and messengers-at-arms to cite " in terms of the Bankruptcy "(Scotland) Act, 1913, to appear in Court on the "seventh day next after citation if within Scotland, "and on the fourteenth day next after citation if "furth of Scotland, to shew cause why sequestration "of his estates should not be awarded, and directs "intimation of this warrant and of the diet of "appearance to be published in the *Gazette;* Further, "the Lord Ordinary grants diligence to recover "evidence of the notour bankruptcy, and of the "other facts necessary to be established, and com- "mission to to take the oaths of "witnesses and havers in common form."

The *Gazette* is the *Edinburgh Gazette.*

It is incompetent to allow a proof upon the question of jurisdiction (the point being raised on a *caveat*) before granting warrant to cite.[2] The direction in the statute to grant a warrant to cite is peremptory, even where the only voucher produced is under suspension.[3]

(*e*) *Inducice of Citation.*—The new rule is:—

Where service is made personally or at a dwelling-house or place of business, the *inducice* are not less than six nor more than fourteen days; when made edictally the *inducice* are fourteen days.[4]

(*f*) *Warrant for Citation.*—Upon the certified copy Petition

[1] *Archibald Arrol & Sons, Ltd.* v *Christie*, 1901, 4 F. 262.
[2] *Hope* v *Macdougall*, 1893, 21 R. 49.
[3] *Train* v *Steven*, 1904, 7 F. 47.
[4] Bankruptcy (Scotland) Act, 1913, sec. 27.

there is written a copy of the first deliverance, which is then certified by the clerk. The certified copy Petition with the copy of the first deliverance is then borrowed up and this is the warrant for citation.

(*g*) *Citation.*—Where the debtor is within Scotland, he may be cited by delivering to him personally, or by posting in a registered letter addressed to him at his dwelling-house or place of business, or the dwelling-house or place of business last occupied by him, a copy of the petition and warrant.[1] It is not only interesting but imperative to note that the only alternative to personal service is service by post, and that apparently service by a messenger-at-arms in any other manner than personally has been abolished.

Where the debtor is furth of Scotland, he is cited by leaving a copy of the Petition and warrant at the office of edictal citations *and* at the dwelling-house or place of business last occupied by him.[2]

In edictal citations where the address of the debtor in England or Ireland is known, a copy of the Petition must be sent to him at that address by registered letter posted on the day on which the *inducicæ* of citation begin to run.[3]

(*h*) *Abbreviate of Sequestration.*—It is the duty of the petitioner to present, before the expiration of the *second* lawful day after the first deliverance, an abbreviate of the Petition and deliverance, signed by him or his agent, in the following form:—

"Petition for sequestration of A B (*name and designation*).

"Date of first deliverance day of

"(Signed) C D (*if an agent, state so.*)

"(*Date.*)"

to the Keeper of the Registers of Inhibitions and Adjudications at Edinburgh, who shall forthwith record the said abbreviate in the said registers, and write and subscribe a certificate thereof on the said abbreviate in the following form:—

"This abbreviate was presented by (*name and*

[1] Bankruptcy (Scotland) Act, 1913, sec. 25.

[2] *Ibid.*, *Strickland, Petitioner*, 1911, 1 S.L.T. 212.

[3] Bankruptcy (Scotland) Act, 1913, sec. 27.

"*design the presenter*) and recorded on (*date*) in the "Registers of Inhibitions and Adjudications.

"(Signed) E F, Keeper."

On the request of the party transmitting such abbreviate, and on payment by him of the fees of such registration and of the postage, the keeper of the registers re-transmits the said abbreviate by post to said party.[1]

It is necessary to lodge the abbreviate in process.

(*i*) *Commission to Recover Evidence of Notour Bankruptcy, &c.*—Authority for this commission is granted in the first deliverance, and it should be executed with all the solemnities required in an ordinary commission.[2]

At the commission oral evidence should be led that the debtor is subject to the jurisdiction of the Supreme Courts of Scotland, and has within a year before the presentation of the Petition resided, or had a dwelling-house or place of business, in Scotland; or otherwise, in the case of a company, that it has within such time carried on business in Scotland and that a partner thereof has so resided or had a dwelling-house, or that the company has had a place of business in Scotland.[3]

Whether the documents constituting notour bankruptcy have been produced with the Petition or not, the person in whose hands they are should be examined as a witness and haver;[4] and where destroyed, parole evidence may be received.[5]

The commission should not be executed until after the debtor has been cited in terms of the first deliverance, and intimation of the diet should be given to the debtor, or his known agent.[6]

(*j*) *Minute Craving an Award.*—After due advertisement in the *Gazette* and service upon the debtor, and after the commission to recover evidence of notour bankruptcy, &c., has been executed and the *inducicæ* have expired, the petitioner must lodge a minute narrating

[1] Bankruptcy (Scotland) Act, 1913, sec. 44. Schedule A, Nos. 1 and 2.
[2] *Laird* v *Scott*, 1914, 1 S.L.T. 368.
[3] Bankruptcy (Scotland) Act, 1913, sec. 11. *Bank of Scotland* v *Youde*, 1908, 15 S.L.T. 847.
[4] Antonio, p. 367.
[5] *Drummond* v *Clunas Tiles and Mosaics, Ltd.*, 1909, 1 S.L.T. 508.
[6] Antonio, p. 368.

the various steps of procedure in the Petition and craving an award of sequestration. Along with the minute are lodged the report of the commission, a copy of the *Gazette*, and any productions obtained at the execution of the commission. The execution of citation should also be lodged.

(*k*) *Entering Appearance.*—If the debtor desires to appear in the process and to be heard when the award of sequestration comes to be made he should enter appearance. To do this either he or his agent attends at the Bill Chamber and puts a mark of appearance on the principal Petition. If a *caveat* has been lodged for the debtor appearance does not require to be entered. In either of these cases the minute craving an award must be intimated to the debtor and the Petition formally enrolled. Where no appearance is entered these steps are unnecessary.

(*l*) *Minute by Debtor.*—Where the debtor intends to oppose the award of sequestration, and for that purpose has either lodged a *caveat* or entered appearance, he may lodge a minute setting forth the reasons why an award of sequestration should not be granted.[1] Although seldom seen in practice such a minute has much to commend it, especially if clear and succinct.

(*m*) *Award of Sequestration or Dismissal of Petition.*—If no *caveat* has been lodged, or if appearance has not been entered by the debtor, sequestration is awarded as a matter of course in terms of the minute lodged by the petitioner craving an award of sequestration. No enrolment for that purpose is necessary.

If a *caveat* has been lodged, or if appearance has been entered by the debtor, the Petition must be enrolled before the Lord Ordinary and intimation of the enrolment made to the debtor. The parties are then heard upon the minute of the petitioner and the minute of the debtor, if the latter has lodged one. If the debtor has not lodged a minute he may be heard orally.

The only grounds upon which an award of sequestration can be opposed are:—

(i.) That the statutory pre-requisites have not been

[1] *Stuart & Stuart* v *Macleod*, 1891, 19. R. 223; *Laird* v *Scott*, 1914, S.L.T. 368 (not reported on this point).

observed,[1] such as, want of jurisdiction or residence, defect in the oath, voucher, or commission to recover evidence of notour bankruptcy, defect in the constitution of notour bankruptcy, *e.g.*, that it is instantly verifiable that the debt is contingent, &c., &c.

(ii.) That sequestration has already been awarded in another Court and is undischarged.[2]

The Lord Ordinary may also refuse to award sequestration where the debtor at the diet of appearance instantly pays the debt or debts in respect of which he was made notour bankrupt, or produces written evidence of the same being paid or satisfied, and also pays or satisfies, or produces written evidence of the payment or satisfaction, of the debt or debts due to the petitioner, or to any other creditor appearing and concurring in the Petition.[3]

A distinction has been drawn by one writer between the debt upon which the debtor has been made notour bankrupt and other debts, to the effect that in the case of the former nothing but payment will suffice, whereas in the case of the latter either consignation or caution may be held equivalent to satisfaction.[4] In several cases under the Act of 1839 consignation was held to be sufficient to prevent sequestration being awarded,[5] and of late there has been a tendency, at least in cases where an unsuccessful previous attempt to render a debtor bankrupt has been made, to allow consignation of the debt.[6]

[1] Bankruptcy (Scotland) Act, 1913, secs. 11 and 20; *M'Gavin* v *Ogilvy*, 1854, 16 D. 540; *Cuthbertson* v *Gibson*, 1887, 14 R. 736, per Lord Young; *Forbes* v *Whyte*, 1890, 18 R. 182; *Stuart & Stuart* v *Macleod*, 1891, 19 R. 223; *Riddell* v *Galbraith*, 1896, 24 R. 51. See also *Joel* v *Gill*, 1859, 21 D. 929; *Gillon* v *Cæsar*, 1882, 10 R. 59; *Fraser, Petitioner*, 1897, 5 S.L.T. 29.

[2] Bankruptcy (Scotland) Act, 1913, sec. 16; *Bank of Scotland* v *Youde*, 1908, 15 S.L.T. 847. See also *Fisken* v *Thomson*, 1845, 7 D. 842, per Lord Fullerton; *Thomson, Petitioner*, 1863, 2 M. 325; *Goetze* v *Aders, &c.*, 1874, 2 R. 150; *Gibson* v *Munro*, 1894, 21 R. 840.

[3] Bankruptcy (Scotland) Act, 1913, sec. 29.

[4] Goudy on Bankruptcy (3rd Edition), 153-4.

[5] *Alexander* v *Barclay*, 1845, 7 D. 264; *Roger* v *Gellatly's Trustees*, 1850, 12 D. 985; *Steel* v *M'Ewan*, 1852, 14 D. 348.

[6] Bell Irving, 27th December, 1912, (not reported); *Laird* v *Scott*, 1914, 1 S.L.T. 368.

Where the debt is instantly paid at the diet of appearance the opinion has been expressed that the expenses incurred by the petitioner can only be recovered by action.[1] In a recent case where consignation was allowed, modified expenses were given to the petitioner.[2]

If the petitioning creditor withdraws, or becomes bankrupt, or dies, any other creditor may be sisted in his place and follow out the proceedings.[3]

Objection to sequestration may be made by another creditor as well as by the debtor.[4]

The following is the usual interlocutor awarding sequestration:—

"Edinburgh, 1914.—The Lord "Ordinary having resumed consideration of this "Petition, with the writs produced, together with a "minute now given in for the petitioner, execution "of intimation, copy of the *Edinburgh Gazette*, and "other productions made therewith, no appearance "being made by the after designed *A B*, and evidence "having been produced of the notour bankruptcy of "the said *A B*, and of the other facts necessary to "be established, sequestrates the estates now "belonging, or which shall hereafter belong, to the "said *A B* [*design*] before the date of his discharge, "and declares the same to belong to his creditors, "for the purposes of the Bankruptcy (Scotland) Act, "1913; appoints the creditors to hold a meeting at "the time and place mentioned in the said minute; "viz., on the day of at "o'clock noon, within to elect a "trustee, or trustees in succession, and commis- "sioners, as directed by the statute, and remits to "the Sheriff of the County of to proceed in "manner mentioned in said statute."

The following is the usual interlocutor where sequestration is refused:—

"The Lord Ordinary having resumed considera-

[1] Antonio, p. 369.
[2] *Laird* v *Scott*, 1914, 1 S.L.T. 368.
[3] Bankruptcy (Scotland) Act, 1913, sec. 33.
[4] Bell's Com. II. 293; *Cheyne* v *Walker*, 1828, 7 S. 60.

"tion of the Petition and proceedings dismisses the "Petition and decerns; Further appoints a certified "copy of the Deliverance to be transmitted to the "Keeper of the Registers of Inhibitions and Adjudi- "cations; Finds the petitioner liable to the respon- "dent in expenses, and remits the account thereof, "when lodged, to the Auditor to tax and to report."

(*n*) *Publication of Award and Remit.*—Within *four* days from the date of deliverance awarding sequestration, the party applying for sequestration must insert a notice in the form of Schedule B annexed to the Bankruptcy (Scotland) Act, 1913, in the *Edinburgh Gazette,* and also one notice in the same terms within *six* days from the said date in the *London Gazette.*[1]

Notice of the remit to the Sheriff must be published in the *Edinburgh Gazette* within *four* days of such remit.[2]

The meeting of creditors cannot be less than six days, or more than twelve days, from the date of the notice awarding sequestration appearing in the *Edinburgh Gazette.*

(*o*) *Transmission of Process.*—On a remit of a sequestration awarded in the Bill Chamber being made to the Sheriff, a copy of the Petition for sequestration, and of the first deliverance, and also (where it is different) of the deliverance awarding sequestration, certified by one of the clerks of the Bill Chamber, shall, with the productions, be transmitted by the petitioner to the Sheriff Clerk of the County to the Sheriff of which the sequestration is remitted.[3]

There is left in the Bill Chamber the following parts of process:—Inventory of Process, Petition, Certified Copy Petition containing Execution of Citation, Interlocutor Sheet, Duplicate Inventory of Process, Report of Commission, Minute for Award, and Inventories of Productions.

(3) *Petition at the instance of a Creditor where the Debtor is alive at the date of the Presentation of the Petition but dies*

[1] Bankruptcy (Scotland Act), 1913, sec. 44.

[2] *Ibid.*, sec. 17.

[3] *Ibid.*, sec. 42.

thereafter.—In such circumstances the proceedings are followed out in terms of the Act so far as circumstances will permit.[1] Where a debtor died after presentation of the Petition by a creditor, but before evidence of notour bankruptcy was produced, the Lord Ordinary on production of the execution of citation, &c., and evidence of notour bankruptcy awarded sequestration *de plano*.[2]

(4) *Petition by Creditor where the Debtor is deceased and has died Notour Bankrupt*.—Where the debtor has died notour bankrupt, the procedure in a Petition for sequestration by a creditor is similar to that in a Petition by a creditor where the debtor is alive with the following differences :—

(i.) The petitioning creditor must, in his oath or affirmation, or in a separate oath or affirmation, specify the place where the debtor resided or had a dwelling-house or carried on business in Scotland at the time of his death, and whether he was then owner of estates in Scotland ;[3] and

(ii.) The name of the deceased debtor's successor must be mentioned in the body of the Petition, and a warrant must be craved for service upon him. The first deliverance accordingly contains such a warrant.

(5) *Petition by a Creditor where a Deceased Debtor has died in Embarrassed Circumstances but not Notour Bankrupt*.—Where the requisites for sequestration concur the Lord Ordinary has no discretion and must make the award. At one time there was an idea prevalent that this was merely a process of distribution and that the Court had a discretionary power,[4] but in a case recently decided in the First Division, which unfortunately has not been reported, it is made quite clear that the duty of the Court is purely ministerial, and that it has no discretionary power.[5]

The procedure regulating this Petition is similar to that in the immediately preceding Petition with the following exceptions :—

(i.) That it is unnecessary to produce evidence of domicile or of notour bankruptcy ; and

[1] Bankruptcy (Scotland) Act, 1913, sec 33.

[2] *Younger & Son, Ltd., Petitioners*, 1902, 40 S.L.R. 102.

[3] Bankruptcy (Scotland) Act, 1913, sec. 23.

[4] *M'Letchie* v *Angus Bros.*, 1899, 1 F. 946, per Lord M'Laren.

[5] *Commercial Bank* v *Scott's Executrix*, 1911, reported in the Appendix. See also *Arthur, Petitioner*, 1903, 10 S.L.T. 550.

(ii.) That sequestration cannot be awarded until the expiry of six months from the date of death.[1]

A dissolved firm is not a deceased debtor in terms of the Act, and its estates cannot be sequestrated on the Petition of a creditor unless it is notour bankrupt.[2]

In a very recent case sequestration of the estates of a debtor who died in 1910 was awarded, although sequestration of the estates of his widow, who was his executrix and sole legatee, had already been awarded.[3]

(6) *Petition by a Creditor where a Deceased Debtor has died in Embarrassed Circumstances but not Notour Bankrupt, and where his Successor Concurs or has Renounced the Succession.*—The only difference in this Petition from a Petition where the debtor's successor does not concur or renounce the succession is that whereas in the latter Petition an award of sequestration cannot be made until the expiry of six months from the date of the debtor's death,[4] in the former case sequestration is awarded forthwith,[4] and in the deliverance awarding sequestration any successor who has made up title to or is in possession of any part of the debtor's property is ordained to convey the same to the trustee to be appointed.[5]

(7) *Petition by a Living Debtor with Concurrence of a Creditor or Creditors.*—The instance of this Petition runs:—

"The Petition of *A B* (*designation*) with the concurrence of "*C D* (*designation*) a creditor of the said *A B* to the "amount required by law."

The Petition does not require to set forth that the debtor is notour bankrupt or even insolvent. All that need be averred is the requisite jurisdiction and the concurrence[6] of any one or more creditors whose debt or debts together amount to not less than £50, whether such debts are liquid or illiquid, provided they are not contingent.[7]

It is unnecessary that the concurring creditor should sign the Petition; it is sufficient that the debtor should have in his possession an oath of the concurring creditor.

The Petition may be signed either by the debtor himself or his mandatary. In the former case, the petitioner produces along with the Petition the concurring creditors' oath,[8] which is

[1] Bankruptcy (Scotland) Act, 1913, secs. 11 (2) and 13.
[2] *Stewart & M'Donald* v *Brown*, 1898, 25 R. 1042.
[3] *Poutz* v *Lady Menzies' Trustee*, 9th April, 1915, 1 S.L.T. 443 (Lord Ormidale).
[4] Bankruptcy (Scotland) Act, 1913, sec. 13.
[5] *Ibid.*, sec. 28.
[6] *Ibid.*, sec. 11 (1) (A).
[7] *Ibid.*, sec. 12.
[8] *Ibid.*, sec. 20.

in the same form as the oath where a creditor alone is petitioner. See *supra*, p. 180. In the latter case, not only must the concurring creditor's oath be produced but there must be produced a mandate authorising the application, signed by the debtor, or in the case of a company signed by a party entitled to act for the company.[1]

Where the mandate is by a firm it should be written by a member of the firm, and signed on behalf of the firm and by all the partners.[2]

Where a debtor grants a mandate and dies before the mandatary presents a Petition, the latter may proceed with the Petition in his own name.[3] If, however, the mandatary of a debtor presents a Petition for sequestration of the debtor, and the latter dies after the presentation of the Petition, but before the date of the deliverance awarding sequestration, the proceedings are void.[4]

A mandate should be either holograph, adopted as holograph, or tested, and must be dated. It does not require to be stamped.[5]

A mandate should not be in favour of a firm of law agents, but should be granted to one partner, whom failing, to another.[6]

When a mandate is to a law agent he should be a Court of Session practitioner.[7] Mandates must be of recent date.[7]

There is no *inducice* or service, and accordingly the first deliverance is an interlocutor awarding sequestration of the estates which then belong to the debtor before the date of the discharge, and declaring the estates to belong to the creditors for the purposes of the Act.[8] The Petition is then remitted to the Sheriff of the County of the debtor's domicile.

A Petition by a debtor with concurrence may be presented in the Bill Chamber at any time.[9]

(8) *Petition by a Mandatary of a Deceased Debtor.*—The points to be attended to in this Petition are:—

(i.) The clause in the present Act[10] dealing with this Petition

[1] Bankruptcy (Scotland) Act, 1913, sec. 20.

[2] Antonio, p. 363; *Maclean, &c., Petitioners*, 1824, 3 S. 122 (N.E. 82); *Buchanan and Anderson, Petitioners*, 1849, 11 D. 510.

[3] Bankruptcy (Scotland) Act, 1913, sec. 11 (2) (A).

[4] *Orr, &c., Petitioners*, 1882, 10 R. 53.

[5] *Scudamore* v *Lechmere*, 1797, Mor. 8559; Bankruptcy (Scotland) Act, 1913, sec. 189.

[6] Antonio, p. 363.

[7] Antonio, p. 363.

[8] Bankruptcy (Scotland) Act, 1913, sec. 28.

[9] *Ibid.*, sec. 13.

[10] *Ibid.*, sec. 11 (2) (A).

contains no reference to concurrence by the successors of the deceased debtor. The Act of 1856[1] was in similar terms, yet it was the practice under the latter Act to have, where possible, the concurrence of the deceased debtor's successors to the Petition. The instance of the Petition accordingly ran—"The "Petition of *A B*, &c., mandatory of the deceased "*C D*, &c., conform to mandate produced, with con- "currence of , the only children, heirs, and "successors of the said deceased *C D*" (*or as the particular circumstances happened to be*).

It is anticipated that this practice will be continued.

(ii.) The mandate. See *supra*, p. 193.

(9) *Petition for Recall of Sequestration.*

(*a*) *To Whom Presented.*—This Petition can only be presented to the Lord Ordinary on the Bills,[2] except where a majority of the creditors in number and value reside in England or in Ireland, in which case it may be presented to either Division of the Court or to the Lord Ordinary on the Bills.[3]

(*b*) *Who may Present, and when it may be Presented.*—It may be presented within forty days after the date of the deliverance awarding sequestration by either:—

(i.) any debtor whose estate has been sequestrated without his consent;

(ii.) the successors who have not renounced the succession of any deceased debtor whose estate has been sequestrated without their consent, unless on the application of a mandatary authorised by the deceased debtor; or

(iii.) any creditor.[4]

Where sequestration has been awarded of the estate of a deceased debtor, when his successor was edictally cited, it is competent for his successor, or any person having interest, to present a Petition at any time before the publication of the advertisement for payment of the first dividend.[4]

[1] Bankruptcy (Scotland) Act, 1856, sec. 13 (2) (A).
[2] Bankruptcy (Scotland) Act, 1913, sec. 30.
[3] *Ibid.*, sec. 43.
[4] *Ibid.*, sec. 30.

Nine-tenths in number and value of the creditors ranked on the estate may at any time apply for recall.[1]

The Accountant of Court or any creditor or other person having interest may present a Petition to either Division of the Court or to the Lord Ordinary on the Bills at any time within three months after the date of sequestration stating that a majority of the creditors in number and value reside in England or in Ireland, and that from the situation of the property of the bankrupt or other causes his estate and effects ought to be distributed among the creditors under the bankrupt or insolvent laws of England or Ireland, and asking that the sequestration be recalled.[2]

A creditor may be barred *personali exceptione* from petitioning for recall if he has homologated the sequestration.[3]

If a creditor who has petitioned for recall withdraws, or becomes bankrupt, or dies, any other creditor may be sisted in his place and follow out the proceedings.[4]

(*c*) *Form of Petition.*—The instance of the Petition varies according to the person who is petitioner, and must be correctly set forth.[5] If the petitioner is a creditor he must produce an oath and vouchers in the same manner as if he were a petitioner for sequestration.[6] See *supra*, p. 180.

The grounds for recall must be set forth.[7]

The prayer craves the Lord Ordinary to appoint a copy of the Petition for recall and of his deliverance thereon to be served on the parties who petitioned or concurred in the Petition for sequestration, or on their respective known agents, and on the trustee, if appointed,[8] and to ordain them to

[1] Bankruptcy (Scotland) Act, 1913, sec. 31.
[2] Bankruptcy (Scotland) Act, 1913, sec. 43.
[3] *Ure* v *M'Cubbin*, 1857, 19 D. 758; *Tennent* v *Martin*, 1879, 6 R. 786, per L. P. Inglis, p. 788.
[4] Bankruptcy (Scotland) Act, 1913, sec. 33.
[5] *Haines* v *Shaw*, 1862, 24 D. 383.
[6] *Perryman* v *M'Clymont*, 1852, 14 D. 508; *Partridge* v *Baillie*, 1873, 1 R. 253, per Lord Cowan.
[7] Bankruptcy (Scotland) Act, 1913, sec. 30.
[8] *Arnold* v *Winton*, 1852, 14 D. 986.

lodge answers thereto within a specified short time, and to appoint a notice of the presentation of the Petition for recall to be published in the *Gazette*, and on the expiry of the time so fixed to recall the sequestration and appoint the judgment of recall to be entered in the Register of Sequestrations and an abbreviate extract thereof to be recorded in the Registers of Inhibitions and Adjudications.[1]

If the Petition is at the instance of nine-tenths in number and value of the creditors ranked on the estate the prayer is to appoint a notice of his deliverance to be published in the *Gazette* requiring all concerned to appear within fourteen days from the date of publication to show cause why the sequestration should not be recalled and on the expiration of the said time to proceed to recall the sequestration.[2]

The Petition must be signed by the petitioner, his counsel or agent.[3]

(*d*) *Making up a Process.*—As this is a substantive, and not an incidental Petition, a process must be made up in the usual way. See *supra*, p. 176.

(*e*) *Grounds of Recall.*—The grounds of recall may be such as have already been urged unsuccessfully in opposition to the award of sequestration;[4] or grounds which were available but which were not urged in opposition to the award of sequestration;[5] or grounds which have emerged since the award of sequestration was made.[6]

Where the grounds of recall are defects which appear *ex facie* of the proceedings, such as, defects in the statutory pre-requisites,[7] the Court has no discretion but must recall.[8] Where the defects do not

[1] Bankruptcy (Scotland) Act, 1913, sec. 30.

[2] Bankruptcy (Scotland) Act, 1913, sec. 31.

[3] *Scott* v *Anstruther*, 1848, 10 D. 732.

[4] *Elder* v *Thomson, Elder, and Burn*, 1850, 12 D. 994.

[5] *Campbell* v *Myles*, 1853, 15 D. 685; *Ballantyne* v *Barr*, 1867, 5 M. 330 per Lord Neaves, p. 334.

[6] Goudy on Bankruptcy (3rd Edition), p. 159.

[7] *Morrison* v *Turnbull*, 1832, 10 S. 259; *Campbell* v *Myles*, 1853, 15 D. 685; *Ballantyne* v *Barr*, 1867, 5 M. 330; *Mitchell* v *Motherwell*, 1888, 16 R. 122; *Riddell* v *Galbraith*, 1896, 24 R. 51.

[8] *Tennent* v *Martin*, 1879, 6 R. 786 per L.P. Inglis, p. 788; *Blair* v *North British & Mercantile Insurance Co.*, 1889, 16 R. 325, per L.P. Inglis, p. 328.

appear *ex facie* of the proceedings the Court has a discretion,[1] and accordingly the Petition for recall may be refused [2] or granted.[3]

An award of sequestration may be recalled *in hoc statu*, as, where two separate awards have been granted against the same debtor the Court may recall either award according to the circumstances of the case.[4]

In the case of a Petition presented on the ground that a majority of the creditors in number and value reside in England or in Ireland,[5] the power of recall is discretionary.[6] The section of the Bankruptcy Act dealing with this subject does not apply where a majority of creditors reside outwith the United Kingdom.[7]

(*f*) *Who may oppose Recall.*—The petitioning or concurring creditor, or the trustee when his election is confirmed. Where the petitioning or concurring creditor or the confirmed trustee does not oppose, any creditor may do so.[8] The bankrupt himself may oppose recall, and he is entitled to do so without finding caution.[9]

Where a creditor has appeared to oppose a Petition for recall, or has lodged an objection, withdraws, or becomes bankrupt, or dies, any other creditor may be sisted in his place and follow out the proceedings.[10]

[1] *Blair* v *North British & Mercantile Insurance Co.*, 1889, 16 R. 325, per L.P. Inglis, p. 328; *M'Hardy, Petitioner*, 1904, 12 S.L.T. 569; *Smith* v *Pirie's Trustees*, 1907, 14 S.L.T. 705.

[2] *Kid* v *Rose*, 1830, 8 S. 510; *Gray* v *Cockburn*, 1844, 6 D. 569; *Macnab* v *Hunter*, 1851, 14 D. 182; *Gardner* v *Woodside*, 1862, 24 D. 1133, per L.P. M'Neill and Lord Deas; *Gillon* v *Cæsar*, 1882, 10 R. 59; *Mitchell* v *Motherwell*, 1888, 16 R. 122; *M'Hardy Petitioner*, 1904, 12 S.L.T. 569; *Smith* v *Pirie's Trustees*, 1907, 14 S.L.T. 705; *Drummond* v *Clunas Tiles and Mosaics, Ltd.*, 1909, S.C. 1049.

[3] *Gardner* v *Woodside*, 1862, 24 D. 1133; *Anderson* v *Stephen*, 1868, 40, Jur. 498; *Blair* v *North British & Mercantile Insurance Co.*, 1889, 16 R. 325; *Aitken* v *Kyd*, 1890, 28 S.L.R. 115; *Bain, &c., Petitioners*, 1901, 9 S.L.T. 15.

[4] *Jarvie* v *Robertson*, 1865, 4 M. 79; *Kelloch* v *Anderson*, 1875, 3 R. 239; *Blair & Co.* v *MacKenzie*, 1899, 1 F. 854; *Barns Graham* v *Bowie*, 1903, 5 F. 1230. See also *Tennent* v *Martin*, 1879, 6 R. 786; *Fletcher* v *Anderson*, 1883, 10 R. 835; *Giles, Petitioner*, 1898, 5 S.L.T. 311; *Lochrie* v *Macgregor*, 1911, S.C. 21.

[5] Bankruptcy (Scotland) Act, 1913, sec. 43.

[6] *Smith* v *Rostron*, 1860, 23 D. 140; *Brandon* v *Stephens*, 1862, 24 D. 263; *Haines* v *Shaw*, 1862, 24 D. 383; *Moses* v *Gifford*, 1866, 4 M. 1056; *Smith, Payne Smiths* v *Rischmann*, 1869, 8 M. 100.

[7] *Smith, Payne Smiths* v *Rischmann*, 1869, 8 M. 100.

[8] *Lockhart* v *Mitchell*, 1849, 11 D. 1341, per Lord Fullerton.

[9] *Hooper* v *Fergusson*, 1850, 12 D. 1309.

[10] Bankruptcy (Scotland) Act, 1913, sec. 33.

(*g*) *Petition does not Sist Sequestration.*—Pending a Petition for recall, and until the sequestration be finally recalled, the proceedings in the sequestration go on as if no such Petition had been presented.[1]

(*h*) *Procedure.*—The first deliverance by the Lord Ordinary appoints a copy of the Petition for recall and of his deliverance to be served upon the petitioners, or parties concurring in the Petition, for sequestration, or on their known agents, and on the trustee if appointed and confirmed.[2] The Lord Ordinary may also, if there is any indication of collusion, order service upon all the creditors.[3] The parties upon whom the Petition is served are ordained to lodge answers within a specified short time, and a notice of the presentation of the Petition is published in the *Edinburgh Gazette.* Where the Petition is at the instance of nine-tenths of the creditors a notice of the Lord Ordinary's deliverance must be published in the *Gazette* requiring all concerned to appear within fourteen days from the date of publication to show cause why the sequestration should not be recalled.[4] If no answers are lodged the Lord Ordinary proceeds to pronounce judgment. If answers are lodged, a record may be made up by minute and answers, or condescendence and answers, and a proof may be taken.[5]

If the Lord Ordinary recalls the sequestration, the recall is entered in the Register of Sequestrations, and an abbreviate extract thereof is recorded in the Registers of Inhibitions and Adjudications.[6] The abbreviate extract is in the following terms:—

> The sequestration of the estates of *A B* (*name and designation*), the first deliverance in which is dated (*insert date*) has been recalled (*or* declared at an end) conform to deliverance by the Lord

[1] Bankruptcy (Scotland) Act, 1913, sec. 32; *Ballantyne* v *Barr*, 1867, 5 M. 330 per Lord Neaves, p. 335.

[2] *Arnold* v *Winton*, 1852, 14 D. 986; Bankruptcy (Scotland) Act, 1913, sec. 30.

[3] Bell's Commentaries, 5th Edition, II., 331.

[4] Bankruptcy (Scotland) Act, 1913, sec. 31.

[5] *Muir* v *Stevenson*, 1850, 12 D. 512; *Arnold* v *Winton*, 1852, 14 D. 986.

[6] Bankruptcy (Scotland) Act, 1913, sec. 30.

Ordinary (*or as the case may be*), dated (*insert date*), in terms of the Bankruptcy (Scotland) Act, 1913.

Extracted day of

D E, Clerk of Bills.[1]

(*i*) *Review.*—The interlocutor of the Lord Ordinary refusing or granting the Petition is subject to review by a reclaiming note in common form presented within fourteen days from the date of the judgment, and such reclaiming note shall be disposed of by the Inner House as speedily as the forms of the Court will allow,[2] *i.e.*, the reclaiming note is sent to the Summar Roll. It may be marked to a Division other than the Division to which the Petition for sequestration has been marked.[3] See *supra*, p. 178.

(*j*) *Expenses.*—When the Petition is successful, the petitioner is not awarded expenses.[4] The expenses caused by the unsuccessful opposition to the Petition, however, may be awarded against the party opposing.[5] *See* Maclaren on Expenses, p. 361 *et seq.*

(10) *Petition for Summary Sequestration.*

(*a*) *Generally.*—There has been introduced into the Bankruptcy (Scotland) Act, 1913, a new provision whereby the estate of a debtor whose assets of every description do not in the aggregate exceed £300 in value may be wound up under a summary sequestration. This new process is in substitution for the process of *cessio* which is now abolished and which could only be instituted in the Sheriff Court. The new process is intended to be instituted and carried through in the Sheriff Court as far as possible, and in only two cases can such a Petition be presented in the Bill Chamber. These cases are:—

(i.) Where a debtor is notour bankrupt, a creditor whose claim amounts to £10 or upwards, or two or more

[1] Bankruptcy (Scotland), Act, 1913, schedule E., No. 5.

[2] Bankruptcy (Scotland) Act, 1913, secs. 43 and 167.

[3] *Cooper* v *Baillie*, 1878, 5 R. 414. See also *Gow* v *Bell*, 1862, 1 M. 25.

[4] *Smith, Bros., & Co.* v *Rostron*, 1860, 23 D. 140.

[5] *Campbell* v *Myles*, 1853, 15 D. 685; *Brandon* v *Stephens*, 1862, 24 D. 263; *Haines* v *Shaw*, 1862, 24 D. 383; *Gardner* v *Woodside*, 1862, 24 D. 1133; *Young* v *Buckel*, 1864, 2 M. 1077; *Jarvie* v *Robertson*, 1865, 4 M. 79; *Moses* v *Gifford*, 1866, 4 M. 1056; *Ballantyne* v *Barr*, 1867, 5 M. 330; *Anderson* v *Stephen*, 1868, 40 Jur. 498.

creditors whose claims in the aggregate amount to £10 or upwards, and who do not know within which Sheriffdom the debtor resided or carried on business during the year immediately preceding the date of the Petition, may present a Petition to the Court of Session in the Bill Chamber, within four months after the constitution of notour bankruptcy.[1]

(ii.) Where the debtor is furth of Scotland, such a Petition may be presented in the Bill Chamber.[1]

(*b*) *Form of Petition.*—The following is a form of Petition where the debtor is furth of Scotland and where a Judicial Factor is desired to be appointed :— [2]

Unto the Honourable the Lord Ordinary officiating on the Bills.

The Petition
of
A B (*designation*), a creditor to the extent required by law of *C D*, lately at , and now furth of Scotland, and whose place of residence is unknown to the petitioner.

Humbly Sheweth,

That the petitioner is a creditor of the said *C D* for the sum of £ , conform to oath and extract decree (*or* bill *or* voucher) herewith produced.

That the said *C D* has during the year immediately preceding the application carried on business as a in , but he is now believed to be furth of Scotland.

That the said *C D* has been rendered notour bankrupt within the last four months and still remains in a state of notour bankruptcy.

That the assets of every description of the said *C D* do not in the aggregate exceed £300 in value.

That the said *C D* has gone away without leaving any address, and it is necessary in the mean-

[1] Bankruptcy (Scotland) Act, 1913, sec. 175 (1) (2).

[2] This form may be altered to suit the case where the petitioner does not know within which Sheriffdom the debtor resided or carried on business during the year immediately preceding the date of the Petition.

time for the preservation of his estate, part of which is of a perishable nature, that a judicial factor should immediately be appointed to take charge of said business, and the petitioner begs respectfully to suggest that be appointed to that office.

That the present application is made under the Bankruptcy (Scotland) Act, 1913.

May it therefore please your Lordship to grant warrant to cite the said *C D* to appear before your Lordship on such *inducicæ* as your Lordship may direct to show cause why sequestration of his estates should not be awarded; to direct intimation of the said warrant and of the diet of compearance on such *inducicæ* to be made in the *Edinburgh Gazette;* to ordain the said *C D* to lodge in the hands of the Clerk of the Bills a state of affairs in terms of said Act; to grant diligence to recover evidence of the notour bankruptcy of the said *C D*, and of the other facts necessary to be established; and on resuming consideration of this Petition to award sequestration of the estates of the said *C D* in terms of the Bankruptcy (Scotland) Act, 1913; to ordain that the sequestration shall proceed as a summary sequestration, and to appoint a meeting of creditors to be held to appoint a trustee or trustees in succession, and commissioners, on the said sequestered estates and to do the other acts provided by the said statute: Further to remit to the Sheriff of to proceed in manner mentioned in said statute, and in the meantime to nominate and appoint the said , or such other suitable person as your Lordship shall think fit, as judicial factor on the said sequestrated estates until a trustee shall be confirmed thereon, he always finding caution as your Lordship may deem necessary with the powers necessary for the preservation of the estates of the said *C D* in terms of the 14th section of the said statute, or to do otherwise in the premises as to your Lordship shall seem just.

According to justice, &c.

(*c*) *First Deliverance.*—The first deliverance is in the following terms:—Edinburgh, 19 . The

Lord Ordinary having considered this Petition with the writs produced, grants warrant to macers and messengers-at-arms to cite in terms of the "Bankruptcy (Scotland) Act, 1913," to appear in Court on the seventh day next after citation if within Scotland, and on the fourteenth day next after citation if furth of Scotland, to show cause why sequestration of estates should not be awarded; and directs intimation of this warrant and of the diet of appearance to be published in the *Gazette;* ordains the said within six days after the service of this order upon him, to lodge in the hands of the Clerk of the Bills a State of Affairs in terms of said Act: Further, the Lord Ordinary grants diligence to recover evidence of notour bankruptcy, and of the other facts necessary to be established, and commission to to take the oaths of witnesses and havers in common form.[1]

(*d*) *Award of Sequestration.*—The interlocutor making an award of sequestration is usually in the following terms:—

Edinburgh, 19 .—The Lord Ordinary having resumed consideration of this Petition with the writs produced, together with a minute now given in for the petitioner, execution of intimation, copy of the *Edinburgh Gazette,* and other productions made therewith, no appearance being made by the after-designed, [2] and evidence having been produced by the notour bankruptcy of the said and of the other facts necessary to be established, and having considered the State of Affairs lodged by the said [3] sequestrates the estates now belonging or which shall hereafter belong to the said before the date of discharge, and declares the same to belong to

[1] Bankruptcy (Scotland) Act, 1913, sec. 175 (4).

[2] Where no State of Affairs has been lodged by the debtor or on his behalf, this fact may be inserted here.

[3] This clause may be omitted where no State of Affairs has been lodged.

creditors for the purposes of the "Bankruptcy "(Scotland) Act, 1913;" Ordains the sequestration to proceed as a summary sequestration: Appoints the creditors to hold a meeting at the time and place mentioned in the said minute, viz., on the day of at o'clock noon, within to elect a trustee or trustees in succession, and commissioners, as directed by the statute, and remits to the Sheriff of to proceed in manner mentioned in said statute.

(*e*) *Procedure.*—With the exception of the first deliverance and the award of sequestration which are in slightly different terms from the first deliverance and the award of sequestration in ordinary sequestrations, the procedure in summary sequestrations is similar to that in ordinary sequestrations. Thus, with the Petition there should be lodged similar productions to the productions in an ordinary sequestration. Everything being in order, the first deliverance, in the terms already set forth (see *supra*, p. 201) is pronounced, and advertisement and service made as in an ordinary sequestration. A commission to recover evidence of notour bankruptcy and of the other facts necessary is executed as in an ordinary sequestration. After the expiry of the *inducice* a minute craving an award of sequestration is lodged by the petitioner, and if there is no opposition an award is given in the terms already set forth (see *supra*, p. 202) without the necessity of enrolment. If a *caveat* has been lodged or appearance has been entered by the debtor or another creditor the Petition must be enrolled before the Lord Ordinary, and the party opposing may either lodge a minute stating his reasons why an award should not be made, or he may state his objections orally at the bar. If his objections are repelled, an award of sequestration must be given, unless the debtor instantly pays the debt of the petitioner and of the person who has made him notour bankrupt, or satisfies the debt of the petitioner by making consignation of the amount due to him.

Notwithstanding, the terms of sec. 175 (5) it is thought that where all the statutory requirements have been observed the Lord Ordinary has no discretion but must award sequestration.

A process must be made up in the usual way See *supra*, p. 176.

(*f*) *Whether Petition is to Proceed as a Summary Sequestration.* — When the Lord Ordinary awards sequestration he may either order that the sequestration shall proceed as a summary sequestration, or he may make no such order. In the latter case the Petition proceeds as an ordinary sequestration, that is, assuming that the creditor's qualification is sufficient. Upon the question whether the Petition shall proceed as a summary sequestration or not the decision of the Lord Ordinary is final, without prejudice to the sequestration being recalled as in an ordinary Petition for sequestration.[1]

(*g*) *Review.*—If sequestration is awarded there is no appeal;[2] but if sequestration is refused it is thought that the interlocutor refusing sequestration may be brought under review by a reclaiming note in common form presented within fourteen days from the date of judgment.[3]

(*h*) *Recall.*—A summary sequestration may be recalled in the same manner as an ordinary sequestration.[4]

(11) *Petition for Discharge of Bankrupt.*

(*a*) *On Composition.*[5]—It has been found in practice to be more convenient to make application to the Sheriff to sanction the acceptance of an offer of composition made to creditors by the bankrupt or his friends, and accordingly the jurisdiction of the Lord Ordinary on the Bills is seldom invoked for this purpose. When it is invoked the proceedings begin with a report by the trustee following upon the lodging of a bond of caution for payment of the composition offered. The report sets forth the resolution of the meeting at

[1] Bankruptcy (Scotland) Act, 1913, sec. 175 (6).
[2] *Ibid.*, sec. 30.
[3] *Ibid.*, sec. 167.
[4] *Ibid.*, sec. 175 (5).
[5] *Ibid.*, secs. 134, 135, 136, 137, 138.

which the offer of composition was made, and the amount of the composition and the caution With the report are produced the bond of caution, the minutes of meeting of creditors at which the offer was accepted, signed by the chairman of the meeting, a copy of the *Edinburgh Gazette* containing the statutory notice of said meeting, and a copy of the statutory letter issued to creditors with certificate of postage appended. Where the offer of composition amounts to 5s. in the £ or over, no further productions are necessary. If, however, the offer is less than 5s. in the £ it is necessary for the bankrupt to lodge with the trustee a short written statement setting forth that his inability to pay more has arisen from circumstances (which should be detailed) for which he cannot justly be held responsible. A docquet is added to this paper by the trustee certifying the statements therein contained to be correct, and this paper is produced by the trustee along with his report.

The report is subscribed by the trustee and with the relative productions is transmitted to the Clerk of the Bills.

Objections to the acceptance of the composition may be lodged by creditors,[1] by the trustee, and by the bankrupt's cautioner.[2]

After considering the report and productions and hearing the objections (if any) the Lord Ordinary, if he is of opinion that the offer is reasonable and has been assented to by the requisite proportion in number and value of the creditors, and that the trustee's accounts have been audited and the balance ascertained and that the expenses of the sequestration and the remuneration of the trustee have been paid or provided for, issues an interlocutor approving of the composition and security and ordains the bank-

[1] *Brown* v *Whyte*, 1846, 8 D. 822; *Scottish Provincial Assurance Co.* v *Christie*, 1859, 21 D. 333; *M'George* v *M'George's Creditors*, 1887, 14 R. 841. See also *Douglas, Mitchell, & Co.* v *Hunter, Newall, & Co.*, 1859, 21 D. 1302.

[2] *Ironside* v *Gray*, 1841, 4 D. 629; *Miller* v *Keith*, 1872, 11 M. 164; *Lee* v *Stevenson's Trustee*, 1883, 11 R. 26.

rupt to appear before him to take the declaration or oath in terms of the statute.[1]

The bankrupt thereafter appears before the Lord Ordinary and emits a declaration or oath to the effect that he has made a full and fair surrender of his estates and has not granted or promised any payment or entered into any secret or collusive agreement or transaction to obtain the concurrence of any of his creditors to the offer of composition and security. If the bankrupt is abroad, or is by a lawful cause prevented from appearing before the Lord Ordinary, his declaration or oath may be taken on commission.[2]

The final interlocutor granting discharge is in the following terms:—

The Lord Ordinary having resumed consideration of the proceedings with the declaration by the bankrupt of , finds the same satisfactory; discharges the bankrupt of the whole debts and obligations contracted by him or for which he was liable at the date of his sequestration; declares the sequestration to be at an end, and the bankrupt re-invested in his estate (reserving always the claims of the creditors for the composition against him and his cautioner); appoints the bond of caution to be recorded, and decerns.

Where the offer of composition is refused, the Lord Ordinary must specify the grounds of refusal.[3]

(*b*) *Without Composition.*

(i.) *Consents necessary to Petition.*—A bankrupt may petition for his discharge with the following consents:—

1. At any time after the meeting held after his examination where every creditor who has produced his oath concurs in the Petition;
2. On the expiry of six months from the date of the deliverance actually awarding sequestration, where a majority in number and four-fifths in

[1] Bankruptcy (Scotland) Act, 1913, sec. 135.

[2] *Ibid.*, 137. See *Brand* v *Gillon*, 1894, 2 S.L.T. 405.

[3] Bankruptcy (Scotland) Act, 1913, sec. 135.

value of the creditors who have produced oaths concur in the Petition;

3. On the expiry of twelve months from the date of said deliverance where a majority in number and two-thirds in value of the creditors concur in the Petition;
4. On the expiry of eighteen months from the date of said deliverance where a majority in number and value of the creditors concur in the Petition; and
5. On the expiry of two years from the date of said deliverance without any consents of creditors.[1]

(ii.) *Form of Petition.*—The Petition is in the name of the bankrupt alone and consents are not referred to in the instance.

The Petition narrates the sequestration and its date; that the statutory meeting appointed to be held after the bankrupt's examination was held on a certain date; that six months (*or* twelve, *or* eighteen, *or* two years) have elapsed from the date of the deliverance awarding sequestration; and that the petitioner is desirous of being finally discharged of all debts contracted before the date of sequestration.

Where the concurrence of creditors is necessary such concurrence is referred to and the minute of concurrence and certificate of the trustee that the necessary consents have been obtained are produced. The report of the trustee on the conduct of the petitioner is also referred to and produced, and finally the amount of the dividend is set forth, and if this is less than 5s. in the £ an averment is made that this has arisen from circumstances for which the bankrupt cannot be justly held responsible.

The prayer of the Petition craves for advertisement of the Petition in the *Edinburgh Gazette* and to be intimated by circular to each of the creditors; and if there is no appearance on the expiry of 21 days from the said publication, or if appearance

[1] Bankruptcy (Scotland) Act, 1913, sec. 143.

has been entered and objections stated and repelled, to find the petitioner entitled to his discharge on making oath or declaration in terms of the statute, and on resuming consideration with the said oath or declaration to grant the petitioner his discharge.

The Petition is signed by the petitioner or his counsel or agent.

(iii.) *Minute of Concurrence.*—The following is a form of a minute of concurrence by creditors to a Petition for discharge of a bankrupt:—(*Place and date*), We, being creditors or mandataries of creditors of *A B* (*designation*), having seen the report by the trustee on his sequestered estates, dated hereby concur in a Petition to be presented by him to the Lord Ordinary on the Bills to be finally discharged of all debts contracted by him before the date of the sequestration of his estates, in terms of and under the provisions of the Bankruptcy (Scotland) Act, 1913.

(*Signatures of creditors or mandataries of creditors.*)

(iv.) *Certificate by Trustee Regarding Consents.* I, *A B* (*designation*), trustee on the sequestrated estates of *C D* (*designation*), hereby certify that the foregoing minute of concurrence has been signed by or on behalf of the whole (*or as the case may be*) of the creditors of the said *C D* who have produced oaths and claims to be ranked on the said sequestrated estates.

(*Place and date.*) (*Signature of trustee.*)

(v.) *Report of Trustee on Bankrupt's Conduct.*—A bankrupt cannot present a Petition for his discharge or obtain any consent of any creditor to such discharge until the trustee has prepared a report with regard to the conduct of the bankrupt, and as to how far he has complied with the provisions of the Act, and, in particular, whether the bankrupt has made a fair discovery and surrender of his estate, and whether he has attended the diets of examination, and whether he has been guilty of any collusion, and whether his bankruptcy has arisen from

innocent misfortunes or losses in business, or from culpable or undue conduct. This report must be prepared by the trustee as soon as may be after the bankrupt's examination, but it is not demandable from the trustee until the expiry of five months from the date of the deliverance actually awarding sequestration.[1] If the report is defective, the bankrupt's only recourse is to the Lord Ordinary on the Bills.[2]

If the trustee has died or cannot be found, an application may be made to the Court of Session for a remit to the Accountant of Court to prepare a report in place of the statutory report by the trustee.[3]

The trustee should make full enquiry and only express his opinion after such enquiry has been made.[4]

Where a bankrupt has failed to pay a dividend of 5s. in the £ a favourable report by the trustee does not entitle him *de plano* to his discharge even though none of the creditors oppose, and he must satisfy the Court that his failure to pay a dividend of 5s. in the £ has arisen from circumstances for which he cannot justly be held responsible. The Court sometimes remits to the Accountant of Court to make investigations.[5]

(vi.) *Who may Oppose.*—Any creditor may oppose even where he has not lodged a claim on the sequestration.[6] A creditor who has given his consent to a discharge, although he cannot withdraw his consent to make the Petition invalid, can change his mind and state his objections to the Court.[7] Although a trustee certifies the concurrence of creditors he is not thereby debarred from objecting as a creditor to the bankrupt's discharge.[8]

[1] Bankruptcy (Scotland) Act, 1913, sec. 143; *Mather* v *M'Kittrick*, 1881, 8 R. 952.

[2] *Cruickshank* v *Gowans*, 1899, 1 F. 692.

[3] *White, Petitioner*, 1893, 20 R. 600.

[4] *Dixon's Trustees* v *Campbell*, 1867, 5 M. 767.

[5] *Bremner, Petitioner*, 1900, 2 F. 1114.

[6] *Cant* v *Bayne*, 1868, 6 M. 368.

[7] *Reid* v *Buchanan*, 1838, 16 S. 549, per Lord Meadowbank, p. 553.

[8] *Wylie and Lochhead* v *Young*, 1859, 21 D. 577, per Lord Curriehill, 583-4.

(vii.) *Report by Accountant of Court.*—In addition to the statutory declaration on oath and the trustee's report, a remit is often made to the Accountant to report, especially in cases where the bankrupt has failed to pay a dividend of 5s. in the £.[1]

(viii.) *Dividend of less than 5s. in the £.*—A bankrupt is not at any time entitled to his discharge unless a dividend of not less than 5s. in the £ has been paid out of the estate of the bankrupt, or that security for payment thereof has been found to the satisfaction of the creditors, or that failure to pay said dividend has in the opinion of the Lord Ordinary arisen from circumstances for which the bankrupt cannot justly be held responsible. Accordingly, in addition to the declaration or oath and report of the trustee, the Lord Ordinary may require the bankrupt to submit such evidence as he may think necessary to satisfy him upon this point.[2]

Upon this question the Lord Ordinary seems to be entitled to exercise a wise discretion.[3] The onus lies upon the bankrupt.[4] A remit is usually made to the Accountant of Court to report.[5]

(ix.) *Procedure.*—The first deliverance is an order for service of the Petition on every creditor in terms of the 143rd section of the Bankruptcy (Scotland) Act, 1913, and for intimation of the Petition in the *Edinburgh Gazette*.[6] After the expiry of 21 days, there being no appearance to oppose the same, the Lord Ordinary, on evidence being produced of concurrence, if such is required, pronounces an interlocutor finding the bankrupt entitled to a discharge.[6] If appearance is made by any of the creditors or by the trustee, the Lord Ordinary judges of any objections against granting the discharge, or defers the consideration of the

[1] *Clarke* v *Crockatt & Co.*, 1883, 11 R. 246; *Boyle, Petitioner*, 1885, 12 R. 1147.

[2] Bankruptcy (Scotland) Act, 1913, sec. 146.

[3] *Bell* v *Bell's Trustee*, 1908, S.C. 853, per Lord Stormonth-Darling and Lord Low.

[4] *Neilson, Petitioner*, 1901, 3 F. 446.

[5] *Clarke* v *Crockatt & Co.*, 1883, 11 R. 246; *Boyle, Petitioner*, 1885, 12 R. 1147.

[6] Bankruptcy (Scotland) Act, 1913, sec. 143.

same for such period as he may think proper, and may annex such conditions thereto as the justice of the case may require.[1] Conditions annexed to the deliverance are purely discretionary on the part of the Lord Ordinary.[2] If the bankrupt is found entitled to his discharge he must make a declaration or oath before the Lord Ordinary that he has made a full and fair surrender of his estate and has not granted or promised any preference or security, nor made or promised any payment, nor entered into any secret or collusive agreement or transaction to obtain the concurrence of any creditor to his discharge.[3] Where the bankrupt is furth of Scotland, or is by any lawful cause prevented from coming before the Lord Ordinary, a commission may be granted to take his declaration or oath.[3]

If the Lord Ordinary is satisfied with the declaration or oath, he pronounces a deliverance discharging the bankrupt of all debts and obligations contracted by him or for which he was liable at the date of the sequestration.[4] The Clerk of the Bills thereupon transmits a signed extract thereof to the Accountant of Court, and an entry of said deliverance is made by the Accountant in the Register of Sequestrations.[4]

An abbreviate of the deliverance of discharge of the bankrupt, whether following on a composition or not, is issued by the Clerk of the Bills in the following terms:—

A B (*name and designation*) has been discharged of all debts and obligations contracted or for which he was liable at the date of the sequestration of his estates (*if upon composition add as follows*:—"the said sequestration declared "at an end and the said *A B* re-invested in his "estates on composition of (*insert amount*)")

[1] Bankruptcy (Scotland) Act, 1913, sec. 143.

[2] *Blaikie* v *Peddie*, 1871, 10 M. 140, per Lord Cowan; *Kirkland* v *Kirkland's Trustee*, 1886, 13 R. 798, per L.P. Inglis, 806; *M'Carter* v *Aikman*, 1893, 20 R. 1090.

[3] Bankruptcy (Scotland) Act, 1913, sec. 144.

[4] *Ibid.*

conform to deliverance by the Lord Ordinary dated the day of , and in the terms of the Bankruptcy (Scotland) Act, 1913.

(*Date*) (*Signed by the Clerk of the Bills.*)[1]

The abbreviate is recorded in the Registers of Inhibitions and Adjudications, and the keeper of such Registers shall, if required, write and subscribe a certificate on the said abbreviate in the following terms:—

This abbreviate was presented by (*name and designation*) and recorded on (*date*) in the Registers of Inhibitions and Adjudications.

(*Signed*) E F, *Keeper*.[2]

(x.) *Review.*—The final deliverance awarding discharge may be reclaimed against within fourteen days from the date of the judgment.[3] Prior deliverances may also be reclaimed against within fourteen days of their dates, and if they have not been reclaimed against within that period they become final, and a reclaiming note against the final deliverance will not subject such prior deliverances to review.[4]

The discretion of the Lord Ordinary will not lightly be interfered with.[5]

(12) *Petition for Discharge of Trustee.*

(*a*) *Where Bankrupt Discharged on Composition.*—Before the Lord Ordinary on the Bills pronounces his deliverance approving of the composition, the commissioners must audit the accounts of the trustee and ascertain the balance due to or by him, and fix the remuneration for his trouble; and the expense attending the sequestration and such remuneration shall be paid or provided for to the satisfaction of the trustee and commissioners before such deliverance is pronounced.[6] Accordingly, when the Lord Ordinary

[1] Bankruptcy (Scotland) Act, 1913, sec. 145, Schedule E., No. 4.

[2] Bankruptcy (Scotland) Act, 1913, Schedule E., No. 2.

[3] Bankruptcy (Scotland) Act, 1913, sec. 167.

[4] *Alison* v *Robertson's Trustees*, 1890, 18 R. 212.

[5] *Millar, Petitioner*, 1877, 5 R. 144, per L.P. Inglis; *Bell* v *Bell's Trustee*, 1908, S.C. 853.

[6] Bankruptcy (Scotland) Act, 1913, sec. 138.

pronounces such deliverance, the trustee's discharge *quoad* the creditors has already been provided for.[1] The trustee is, however, bound to account for his intromissions to the bankrupt before he is entitled to his discharge.[2] There is no method provided by statute for his formal discharge, although the statute mentions that whenever the Lord Ordinary pronounces his deliverance approving of the composition, the trustee shall be exonered and discharged.[3] In practice, however, the trustee presents a Petition[4] to the Lord Ordinary on the Bills craving discharge and delivery of the bond of caution, and sets forth his appointment, the terms of the composition contract, and the approval of the same by the Lord Ordinary. He also produces evidence that he has accounted for his intromissions to the bankrupt and his cautioner, and that he has transmitted the Sederunt Book to the Accountant. The consent of the bankrupt should be obtained, if possible. If not, intimation of the Petition should be made to the bankrupt, his cautioner, and the Accountant.

(*b*) *Where Estate is Wound Up without Composition.*—After a final division of the funds, the trustee may apply for a judicial discharge. For this purpose he must call a meeting of the creditors by an advertisement in the *Gazette* to be held not sooner than fourteen days after such publication, specifying the time, place, and purpose of holding the meeting, and by letters addressed by post to every creditor who has produced an oath.[5] At such meeting the trustee lays before the creditors the Sederunt Book and accounts, with a list of unclaimed dividends, and the creditors may then declare their opinion of his conduct as trustee.[6] Where no creditor appears at said meeting, instead of trying to constitute an irregular meeting, the trustee ought to prepare a certificate to the

[1] *Hemming* v *Galbraith*, 1908, S.C. 897, per Lord M'Laren, 904.

[2] Bankruptcy (Scotland) Act, 1913, sec. 139; *Hemming* v *Galbraith*, *supra*.

[3] Bankruptcy (Scotland) Act, 1913, sec. 139.

[4] *Hepburn*, *Petitioner*, 1842, 4 D. 739.

[5] Bankruptcy (Scotland) Act, 1913, sec. 152.

[6] *Ibid.*, *Milne* v *M'Callum*, 1878, 5 R. 546.

effect that the meeting was duly called, that he attended at the time and place for which it was called, produced the *Gazette* containing the notice of meeting, the copy of the circular calling the meeting with a certificate of postage thereof, a list of unclaimed dividends and the Sederunt Book, but that no creditor appeared. A copy of the certificate should be engrossed in the Sederunt Book.[1]

The trustee may thereafter apply by Petition to the Lord Ordinary for his discharge. The Petition should shortly narrate the necessary facts, viz.:—The date of sequestration, the election and confirmation of the petitioner as trustee, the advertisement of a meeting of creditors in the *Gazette* to consider the trustee's application for discharge, the result of the meeting where such meeting was held or the fact that no creditor appeared, the transmission of the Sederunt Book to the Accountant of Court, the deposit of the unclaimed dividends in the bank, and the transmission of the deposit receipt therefor to the Accountant of Court. The prayer of the Petition should be for exoneration and discharge and for delivery of the bond of caution. There should be produced with the Petition the trustee's Act and Warrant, a copy of the *Gazette* advertising the meeting, a certificate of posting the letters addressed to the creditors, the minutes of meeting of creditors (or a copy of the certificate of the trustee that no creditor appeared), and acknowledgment by the Accountant of Court for the Sederunt Book.

The bankrupt seems to have no right to appear and object,[2] unless perhaps where he appears to ask for a sist to enable him to present a Petition to call the trustee to account for his intromissions.[3] An opinion has been given that the Accountant of Court has no right to object to a discharge being granted to a trustee where the proceedings are regular and no

[1] Notes by the Accountant of Court for the guidance of Trustees, sec. 20, dated 2nd January, 1914.

[2] *M'Culloch, Petitioner*, 1896, 12 S.C.R. 361.

[3] *Duke* v *Somervell*, 1903, 11 S.L.T. 317; *Hemming* v *Galbraith*, 1908, S.C. 897.

creditor objects.[1] Accordingly, the only person who may appear and object is a creditor,[2] and he may object to incompetent proceedings which have not been brought under review within the time fixed by the statute.[3] The Lord Ordinary on advising the Petition with the minutes of meeting, or certificate that no creditor appeared at said meeting, may pronounce or refuse decree of exoneration.[4] If decree of exoneration is pronounced the Clerk of the Bills forthwith transmits to the Accountant of Court a signed extract of said decree which is entered in the Register of Sequestrations, and the bond of caution for the trustee is delivered up.[4]

If a trustee has held office as *interim* judicial factor prior to being elected trustee, he may pray for discharge as factor in the Petition for discharge as trustee.[5]

(*c*) *Prior to Winding-up of Estate.*—Where a trustee has resigned or died, he or his representatives may apply by Petition for discharge so soon as the sequestrated estates have been handed over to the new trustee.[6] The concurrence of the new trustee is not necessary.[7] Such a Petition is competently presented to the Lord Ordinary on the Bills,[8] and although it is not incompetent to make the application to the Inner House, only modified expenses will be allowed in the Inner House out of the funds of the estate.[9]

(13) *Petition for Interim Judicial Factor.*—It is competent for any creditor to present a separate Petition for the appointment of an *interim* judicial factor in order to preserve the sequestrated estates.[10] It is not necessary that the creditor should possess the qualifications for applying for sequestration; the only necessary condition is that he must produce an oath

[1] *M'Cracken's Sequestration*, 1896, 13 S.C.R. 60, per Sheriff-Substitute Watson (Wigtown).

[2] Bankruptcy (Scotland) Act, 1913, sec. 152.

[3] *Lindsay* v *Hendrie*, 1880, 7 R. 911; *cf. Edgar* v *Kennedy and Hutton's Trustee*, 1905, 7 F. 452.

[4] Bankruptcy (Scotland) Act, 1913, sec. 152.

[5] Antonio, p. 381.

[6] *Brown's Trustees, Petitioners*, 1864, 3 M. 56; *M'Ewan's Trustees, Petitioners*, 1872, 9 S.L.R. 568; *Duke* v *Somervell*, 1903, 11 S.L.T. 289.

[7] *Duke* v *Somervell*, 1903, 11 S.L.T. 289.

[8] *Ibid.*

[9] *Elder's Trustees, Petitioners*, 1903, 5 F. 431.

[10] Bankruptcy (Scotland) Act, 1913, sec. 14.

and vouchers to show that he is a creditor.[1] If the creditor petitioning has not already petitioned for sequestration he will obtain the expenses of the Petition for an *interim* factor from the sequestrated estates. If, however, the petitioner has already presented a Petition for sequestration and omitted a crave for the appointment of an *interim* judicial factor he will not obtain the expenses of a separate Petition for that purpose.[2] It is advisable, therefore, for a creditor petitioning for sequestration to include in his petition a crave for the appointment of an *interim* judicial factor, if there is a likelihood of such being required.

An extract of appointment is not in practice required, as a certified copy interlocutor is held to be sufficient.[3]

[1] *Partridge* v *Baillie*, 1873, 1 R. 253, per Lord Cowan.

[2] Antonio, p. 378.

[3] Antonio, p. 379.

CHAPTER IX.

APPEALS IN SEQUESTRATIONS.

(1) *Where Competent.*—It is competent to appeal to the Lord Ordinary on the Bills against the resolutions of creditors at meetings, provided a note of appeal is lodged with, and marked by, one of the clerks of the Bill Chamber within 14 days after the date of the meeting at which the resolution objected to has been passed.[1] In like manner it is competent to appeal to the Lord Ordinary on the Bills against any deliverance of the trustee or commissioners, provided that the note of appeal is lodged and marked as aforesaid within 14 days of the date of the deliverance.[2]

It is competent for a creditor who is dissatisfied with the decision of a trustee admitting or rejecting a claim to appeal by a short written note to the Lord Ordinary on the Bills before the expiration of 14 days from the date of the publication in the *Gazette* of the time and payment of the dividend.[3]

It is competent for the Accountant of Court to report to the Lord Ordinary on the Bills the question of fixing the trustee's fee or commission, where an appeal has been taken against the deliverance of the commissioners thereupon to the Accountant, and where the Accountant does not concur with the commissioners.[4]

Where two or more sequestrations have been awarded by Sheriffs of different counties on the same day, a note of appeal may be lodged in the Bill Chamber for the purpose of obtaining a remit to such Sheriff Court as in the whole circumstances is most expedient.[5]

A note of appeal to the Lord Ordinary on the Bills was recently held competent in order to have a sequestration remitted

[1] Bankruptcy (Scotland) Act, 1913, sec. 165. See also *Robertson* v *Shiels*, 1842, 5 D. 304; *Inglis* v *Taylor*, 1864, 2 M. 882.

[2] Bankruptcy (Scotland) Act, 1913, sec. 165.

[3] *Ibid.*, secs. 123-4.

[4] *Ibid.*, sec. 122.

[5] Bankruptcy (Scotland) Act, 1913, sec. 17.

from one Sheriffdom to another Sheriffdom in which the majority in value of the creditors and the trustee and commissioners resided.

(2) *Who may Appeal.*—Anyone whose rights have been infringed by a resolution of creditors may appeal. Thus, the bankrupt,[1] or a minority of creditors,[2] may appeal, and so may the trustee or commissioners.[3]

The deliverance of a trustee may be appealed against by any creditor, whether the deliverance is in respect of the appellant creditor's own claim, or of the claim of another creditor, and in the latter case it makes no difference that the appellant creditor's own claim has been rejected by the trustee and is under appeal.[4]

A trustee may appeal against a resolution of commissioners,[5] and so also may the Accountant of Court.[6]

(3) *Who should be called as Respondents.*—Where the appeal is against a resolution of creditors, it does not now seem necessary to make any person a respondent,[7] although formerly it was necessary to name the trustee as a party.[8]

Where in an appeal against a resolution of creditors, the objection was that the trustee personally failed in his duty, the respondent was held to be the trustee alone.[9]

Where the appeal is against a deliverance of the trustee or commissioners the trustee should usually be the respondent,[10] except in the case of an appeal against a claim which has been upheld, in which case the creditor whose claim has been upheld is the proper respondent.[11]

(4) *Service.*—In an appeal against a resolution of creditors, although it is not necessary to name any person as respondent, intimation should be made to the creditors by whom the resolution has been carried, and also to the trustee and the bankrupt where their interests are affected.[12]

In an appeal against a deliverance of a trustee, intimation

[1] *Robertson* v *Robertson's Trustee*, 1885, 13 R. 424.
[2] *M'Cubbin* v *Weir*, 1856, 18 D. 1219; *M'George* v *M'George's Creditors*, 1887, 14 R. 841.
[3] *Witham* v *Teenan's Trustee*, 1884, 11 R. 776.
[4] *Morris* v *Connal*, 1843, 5 D. 439.
[5] *Russell* v *Taylor*, 1869, 8 M. 219.
[6] Bankruptcy (Scotland) Act, 1913, sec. 122.
[7] *Purdon* v *Spence*, 1853, 16 D. 164. See also *Witham* v *Teenan's Trustee*, 1884, 11 R. 776.
[8] *Henderson* v *Robb*, 1836, 14 S. 797.
[9] *Smith* v *Crystal*, 1848, 10 D. 1474.
[10] *Russell* v *Taylor*, 1869, 8 M. 219.
[11] *Skinner's Trustee* v *Keith*, 1887, 14 R. 563.
[12] *Purdon* v *Spence*, 1853, 16 D. 164; *Aberdeen Town and County Bank* v *Scottish Equitable Assurance Co.*, 1859, 22 D. 162.

should be made to the trustee; and where the trustee has upheld a claim intimation should also be given to the creditor whose claim has been upheld.[1]

Where a respondent is a mandatary he must be cited as such, otherwise the proceedings are null.[2]

(5) *Form of Appeal.*—There is no statutory form of a note of appeal,[3] but it is the practice to specify the particular ground of appeal and the appropriate remedy.[4] The resolution appealed against ought to be set forth, and the note ought to contain no argument or unnecessary details.[5] The note of appeal is in manuscript.

(6) *Procedure.*—When the note of appeal is lodged and marked, the Lord Ordinary on the Bills issues a deliverance in which he "appoints a copy of the foregoing note of appeal, and "of this deliverance, to be served upon the respondents or their "mandataries or known agents, and appoints the respondents "to appear in Court on the day of , at "o'clock noon." Where there was a failure to carry out an order for service in time to enable the respondents to appear in Court on the day specified in the order, it was held that this did not annul the appeal, and that it was in the discretion of the Court to grant a new order.[6]

At the diet appointed the Lord Ordinary hears the parties *viva voce* and proceeds to dispose of the case, with or without a record as he shall consider best.[7] Where there is any complexity or any disagreement on matters of fact it is usual to have a condescendence and answers, which are sometimes printed, made up in the appeal.[8] Unless in special circumstances, the respondents should, where possible, combine in one defence.[9]

If he sees fit, it is competent to the Lord Ordinary, where any resolution of a meeting of creditors is appealed against, to order a new meeting to be held in order to reconsider the resolution.[10]

[1] *Skinner's Trustee* v *Keith*, 1887, 14 R. 563; *Macfarlan* v *Watson's Trustee*, 1895, 3 S.L.T. 129.

[2] *Ewing* v *Watson*, 1860, 22 D. 354.

[3] *Somerville* v *Darlington*, 1859, 21 D. 467, per L.J.C. Inglis, p. 472.

[4] *Hall* v *Donaghy*, 1866, 5 M. 57, per L.J.C. Inglis, p. 59.

[5] *Taylor* v *Hunter*, 1840, 2 D. 512 (Note at p. 513).

[6] *Aberdeen Town and County Bank* v *Scottish Equitable Assurance Co.*, 1859, 22 D. 162.

[7] Bankruptcy (Scotland) Act, 1913, sec. 165.

[8] *Ord* v *Barton*, 1846, 8 D. 1011.

[9] *Cookson and Steel* v *Boyd's Trustee*, 1864, 2 M. 662. See also *Adam and Kirk* v *Tunnock's Trustee*, 1866, 5 M. 40.

[10] Bankruptcy (Scotland) Act, 1913, sec. 165.

Although in an appeal, both the competency of the resolution and its merits may be questioned,[1] the merits will not lightly be interfered with.[2]

(7) *Reclaiming Note.*—The judgment of the Lord Ordinary on the Bills as an appellate judge may be taken to review of the Inner House in the same way as if he were a judge of first instance. The reclaiming note may be marked by the reclaimer to the Division which he selects notwithstanding that the note of appeal lodged in the Bill Chamber has been marked by the appellant (the respondent in the reclaiming note.)[3] The reclaiming note is sent to the Summar Roll and is disposed of as speedily as the forms of Court will allow.[4]

(8) *Vacation.*—It is competent to bring under review of the Lord Ordinary on the Bills in vacation by a note of appeal lodged and marked by the Sheriff Clerk within eight days of its date, any deliverance of the Sheriff after sequestration has been awarded which is not excluded by statute; and such note, together with the process, must forthwith be transmitted by the Sheriff Clerk to the Clerk of the Bills.[5] Where the Lord Ordinary's decision is not expressly made final, it is subject to review of the Inner House.[5] It is competent for the Inner House or the Lord Ordinary to remit to the Sheriff, with instructions.[5]

The conditions as to boxing and printing imposed by Act of Sederunt, 10th March, 1870, sec. III. (2) and repeated in C.A.S., D. III. 2, do not apply.[6]

An appeal in a sequestration process does not subject to review prior substantive deliverances which have become final.[7]

Where an appeal to the Lord Ordinary on the Bills in vacation is not disposed of during vacation, it proceeds subsequently before the Inner House.[8]

Where an appeal depending before the Inner House in session is not disposed of during session, it is remitted to the Lord Ordinary on the Bills to proceed during vacation.[9]

[1] *Somerville* v *Darlington*, 1859, 21 D. 467; *Steele* v *Ligertwood*, 1865, 3 M. 587.
[2] *Weldon* v *Ferrier*, 1879, 7 R. 235.
[3] *Gow* v *Bell*, 1862, 1 M. 25.
[4] Bankruptcy (Scotland) Act, 1913, sec. 167.
[5] Bankruptcy (Scotland) Act, 1913, sec. 166. See also Court of Session Act, 1868, sec. 71.
[6] *Lamont* v *Lamont's Trustee*, 1904, 6 F. 336.
[7] *Scottish Provincial Assurance Co.* v *Christie*, 1859, 21 D. 333; *Alison* v *Robertson's Trustees*, 1890, 18 R. 212.
[8] *Westland* v *Ross*, 1840, 3 D. 83; *Grant* v *Wilson*, 1859, 22 D. 51.
[9] *Hain* v *M'Cubbin*, 1853, 16 D. 179.

CHAPTER X.

PETITIONS UNDER THE LANDS CLAUSES CONSOLIDATION (SCOTLAND) ACT, 1845.

(1) *To Appoint Oversman.*

(*a*) *Where Competent.*—Where more than one arbiter has been appointed to determine compensation for land compulsorily acquired, the arbiters must before entering upon the reference nominate an oversman, and if such oversman die, or become incapable to act, they must appoint another oversman in his place. If in either of the aforesaid cases the arbiters refuse, or, for seven days after the request of either party to the reference, neglect to make such an appointment either party may present a Petition to the Junior Lord Ordinary in session, or the Lord Ordinary on the Bills during vacation, to make the appointment.[1] In one case where the arbiters could not agree as to an oversman and refused to make an appointment, the Lord Ordinary made the appointment.[2] In a later case, the Lord Ordinary refused to make an appointment in respect that although the arbiters had failed to make an appointment within seven days after being requested to do so, there was no previous nomination of an oversman which had failed.[3]

In cases where lands are compulsorily acquired by a burgh under a public general Act, there is a provision for the appointment of a single arbiter.[4] There is a similar provision in the Housing, Town

[1] 8 Vict. cap. 19, secs. 3, 26, 27.

[2] *MacKenzie* v *Inverness & Ross-shire Railway Co.*, 1861, 24 D. 251.

[3] *Union Bank of Scotland, Ltd., Petitioners*, 1897; Lord Pearson, mentioned at p. 958, Deas and Ferguson's Law of Railways; *cf.* Arbitration (Scotland) Act, 1894 (57 & 58 Vict. cap. 13).

[4] Burgh Police (Scotland) Act, 1903, sec. 57.

Planning, &c., Act, 1909,[1] and the Public Health (Scotland) Act, 1897.[2]

(*b*) *Form of Petition.*—The Petition should be printed. It is addressed to the Court and is marked and presented to the Junior Lord Ordinary.[3] A form may be found in Antonio's Bill Chamber Procedure, p. 296.

(*c*) *Procedure.*—The Petition is boxed and lodged and comes out in the Motion Roll of the Junior Lord Ordinary, when an order is taken for intimation on the walls and in the minute book and for service on the opposite party to the reference and on the two arbiters. The *inducicæ* are eight days. After the expiry of the *inducicæ* the Petition is again enrolled and the prayer granted.

(2) *To Uplift and Apply Consigned Money.*

(*a*) *Generally.*—Where any purchase money or compensation payable to parties under disability amounting to £200 has been deposited in bank, the party who would have been entitled to the rents and profits of the lands, in respect of which such money has been deposited, may petition the Court in order to have the said purchase money or compensation uplifted and applied to the following purposes:—

(i.) In the purchase or redemption of the land tax, or the discharge of any debt or encumbrance affecting the land in respect of which such money has been paid, or affecting other lands settled therewith on the same heirs, or for the same trusts and purposes, or affecting succeeding heirs of entail in any such lands, whether imposed and constituted by the entailer, or in virtue of powers given by the entail, or in virtue of powers conferred by any Act of Parliament;

(ii.) In the purchase of other lands to be conveyed, limited, and settled upon the same heirs, and the like trusts and purposes, and in the same manner as the lands in respect of which such money has been paid stood settled; or

(iii.) If such moneys are paid in respect of any buildings

[1] Sec. 58 (4). [2] Sec. 145.

taken under the authority of the Lands Clauses Consolidation (Scotland) Act, 1845, or the special Act, or injured by the proximity of the works, or in removing or replacing such buildings or substituting others in their stead, in such manner as the Court shall direct; or

(iv.) In payment to any party becoming absolutely entitled to such money.[1]

If such purchase money or compensation does not amount to £200 and exceeds £20, and the same has been paid into the bank, the same procedure is competent.[2]

Where purchase money or compensation payable under a contract with any person who is not entitled to dispose absolutely of the lands, or of his interest therein, to the promoters, has been paid into bank, the said party may petition the Court to allot to any liferenter or person holding for any other partial or qualified right or interest, for his own use, a portion of the sum so paid into the bank as compensation for any injury, inconvenience, or annoyance which he may be considered to sustain, independently of the actual value of the lands to be taken and of the damage occasioned to the lands held therewith, by reason of the taking of such lands and the making of the works.[3]

The holder of a lease or any right or interest in lands less than the fee thereof which has been acquired, or any interest dependent on such lease or right may petition the Court to order the purchase money or compensation to be laid out or invested as will give to the parties interested in such money the same benefit as they would have had if no compulsory purchase had taken place.[4]

Where parties whose lands have been taken compulsorily refuse to convey to the promoters, or do not show title, or cannot be found, the money is deposited in bank, and any party making claim to

[1] 8 Vict. cap. 19, secs. 67 and 68.
[2] *Ibid.*, sec. 69.
[3] *Ibid.*, sec. 71.
[4] *Ibid.*, sec. 72.

the money so deposited or any part thereof, or to the lands, may present a Petition to the Court to order such money to be laid out or invested in the public funds, or heritable securities, or to distribute the same or pay dividends from the same in accordance with the respective rights of the petitioners.[1]

(*b*) *Form of Petition.*—The Petition is addressed to the Court, and marked and presented to the Junior Lord Ordinary.[2] It is usually printed. Forms of the following Petitions may be found by consulting the Session papers of the undernoted cases:—

(i.) Petition under the Land Clauses Act alone to uplift and apply consigned money in payment of improvement expenditure.[3]

(ii.) Petition under both the Land Clauses and the Entail Acts to uplift and apply consigned money in payment of improvement expenditure;[4]

(iii.) Petition to uplift and apply consigned money in payment of a bond and disposition in security over an entailed estate;[5]

(iv.) Petition to uplift and apply money deposited in bank where parties refuse to convey, do not show title, or cannot be found;[6]

(v.) Petition by trustees to lift consigned money and apply in terms of trust deed.[7]

Forms of other Petitions under the Land Clauses Act may be found in—

(i.) Antonio's Bill Chamber Procedure, p. 296, *et seq.*

(ii.) Deas and Ferguson's Law of Railways, p. 930, *et seq.*

(iii.) Juridical Styles, vol. iii., p. 520, *et seq.*

(iv.) Scots Style Book; vol. iii., p. 280; vol. iv., p. 179; vol. v., 202.

(*c*) *Procedure.*—The Petition is boxed and lodged, and comes out on the Motion Roll of the Junior Lord Ordinary. The first order is for intimation in

[1] 8 Vict. cap. 19, secs. 75 and 77.

[2] Distribution of Business Act (20 & 21 Vict. cap. 56), sec. 4.

[3] *Grant* v *Edinburgh, Perth, and Dundee Railway Co.*, 1851, 13 D. 1015.

[4] *Lady Willoughby de Eresby* v *Callander and Oban Railway Co.*, 1885, 13 R. 70.

[5] *Stirling Stuart* v *Caledonian Railway Co.*, 1893, 20 R. 932.

[6] *Moncrieff* v *Edinburgh and Glasgow Railway Co.* 1857, 19 D. 283.

[7] *Dickson's Trustees, Petitioners*, 1889, 16 R. 519.

common form and for service. The only two questions of procedure worthy of notice are the questions (1) of service, and (2) of remit.

(i.) Service must, of course, be made upon the promoters. It is impossible, however, to say that there is a fixed rule as regards service upon the next heirs of entail where the sum consigned is in respect of the compulsory purchase of an entailed estate or a portion thereof. Lord President Inglis has held that where a Petition to uplift and apply consigned money is presented under the Entail Amendment Act the expenses to be borne by the promoters are the expenses that would have to be borne if the application were made under the Lands Clauses Act, and accordingly he disallowed, *inter alia*, the expense of intimating the Petition to the next heirs of entail.[1] This view of intimation was given effect to by Lord Kincairney[2] and Lord Dundas,[3] and in a very recent case by Lord Anderson.[4] On the other hand, Lord Kinnear in a Petition to uplift consigned money under the Land Clauses Act at the instance of an heiress of entail in possession who had become absolutely entitled to the consigned money, held that the petitioner was entitled to the expenses against the promoters of serving the Petition on the next three heirs of entail,[5] and Lord Pearson gave effect to this view in a subsequent case.[6] Lord Pearson has also held that it is necessary to call the next heirs of entail where the application is to uplift and acquire in fee simple, his reason being that this is practically a petition to disentail.[7]

A remit is usually made both to a man of

[1] *Lady Willoughby de Eresby* v *Callander and Oban Railway Co.*, 1885, 13 R. 70.

[2] *Baird, Petitioner*, 1903, 11 S.L.T. 31.

[3] *Carrick Buchanan* v *North British Railway Co.*, 1905, 12 S.L.T. 764.

[4] *Lord Blythswood* v *Glasgow and South-Western Railway Co.*, 1914, 1 S.L.T. 501.

[5] *Lady Stair, Petitioner*, 1882, 19 S.L.R. 618.

[6] *Lord Hamilton, Petitioner*, 1903, 11 S.L.T. 64.

[7] *Davidson, Petitioner*, 1901, 9 S.L.T. 46. See also *Davys, Petitioner*, 1870, 9 M. 44.

business and to a man of skill. If, however, all necessary information is in the process, a remit may be dispensed with.[1] When there is a remit decree is usually granted in terms of the report. Where a warrant is granted to uplift and invest in terms of the report, a further remit is made to the reporter to see the investment carried out, after which there is a decree pronounced interponing authority to the investment in terms of the final report of the man of business.

(*d*) *Expenses.*—The expense of obtaining from the Court the proper orders for the following matters is payable by the promoters of the undertaking, viz.:—the purchase or taking of lands; the investment of monies consigned in Government or real securities; the re-investment thereof in the purchase of other lands; re-entailing any of such lands; the payment of dividends and interest of the securities upon which such monies are invested; and the payment of the principal of such monies or of the securities whereon the same are invested.[2]

The expense of one application only for re-investment in land shall be allowed, unless it shall appear to the Court that it is for the benefit of the parties interested in the said monies that the same should be invested in the purchase of lands in different sums and at different times, in which case it shall be lawful for the Court, if it think fit, to order the expenses of any such investments to be paid by the promoters of the undertaking.[2] A commission to the petitioner's law agent on the price of the property purchased out of the money consigned is a good charge.[3]

In a case where an application to apply the deposited money in the purchase of lands had already been granted with expenses against the promoters, the expenses of a subsequent Petition to apply the

[1] *Gordon Cumming, Petitioner*, 1901, 8 S.L.T. 415. See also *Ross' Trustees, Petitioners*, 1901, 9 S.L.T. 122; *Reddie's Trustees, Petitioners*, 1902, 10 S.L.T. 445.

[2] 8 Vict. cap. 19, sec. 79.

[3] *M'Lean, &c., Petitioners*, 1902, 10 S.L.T. 282.

balance to the expense of improvement were also granted against the promoters.[1]

Where parties entitled to the consigned money are under disability, the expenses of a temporary investment and a subsequent permanent reinvestment must be paid by the promoters.[2] Thus, where glebe lands were taken and the price invested in heritable security which was paid up, and thereafter reinvested in Consols,[3] or feu duties,[4] the expenses of both investments were made payable by the promoters. The expense of a second temporary reinvestment has been allowed.[5] In a case where the consigned money was first applied to pay permanent improvements and the balance invested in heritable security, and some years later the Court allowed part of the invested sum to be uplifted and applied in payment of further improvement expenditure, the expense of both applications was paid by the promoters. Subsequently the debtor in the bond paid up the remainder of the sum invested, and an application was made to the Court to apply the said sum in payment of further improvement expenditure and to find the promoters again liable in expenses, but the Lord Ordinary refused the latter crave.[6]

Where the particular reinvestment is the purchase of other lands to be settled upon the same heirs and in the same manner as in the lands compulsorily taken, the expense of a remit to a man of skill as well as to a man of business is allowed, but the expense of service upon the next heirs of entail is not allowed.[7] The expense of a variety of supplementary reports as to the value of lands to be purchased with the consigned money is not allowed.[8]

Where the Petition is to uplift and to acquire the

[1] *Grant* v *Edinburgh, Perth, & Dundee Railway Co.*, 1851, 13 D. 1015.

[2] *Christie* v *Caledonian Railway Co.*, 1894, 1 S.L.T. 582.

[3] *Gunn* v *Parochial Board of Dollar*, 1886, 23 S.L.R. 623.

[4] *Stewart, Petitioner*, 1875, 12 S.L.R. 303.

[5] *Crawfurd, Petitioner*, 1904, 42 S.L.R. 13; *cf. Stevenson's Trustees, Petitioners*, 1878, 15 S.L.R. 471.

[6] *Logan, Petitioner*, 1889, 26 S.L.R. 521.

[7] *Lord Blythswood, Petitioner*, 1914, 1 S.L.T. 501.

[8] *Duke of Hamilton, Petitioner*, 1858, 21 D. 124.

money in fee simple, the expense of serving the Petition on the next heir or heirs of entail has been allowed.[1]

The expenses allowed are only those enumerated in section 79 of the Act and not those which would seem to follow those which are enumerated as being of the same class with those enumerated.[2]

Where a Petition to apply the sum deposited in improvements on an entailed estate has been presented, expenses have been refused against the promoters.[3]

The expenses of a Petition to uplift in terms of section 77 of the Act are payable by the promoters.[4]

Where the money is consigned by more than one party, the expenses of the Petition are not apportioned in proportion to the sums consigned by the parties respectively, but are equally divided among the different promoters.[5]

Where a respondent offers the taxed amount of expenses of the Petition under deduction of the expense of approval, it should be accepted.[6]

(3) *To Ascertain the Amount of Expense of Conveyances.*

(*a*) *Where Competent.*—The expenses of all conveyances of lands compulsorily acquired are borne by the promoters.[7] Where the promoters and the parties whose lands have been so acquired do not agree as to the amount thereof, such amount may be ascertained and decerned for by the Junior Lord Ordinary on a summary Petition presented to him by the parties entitled to such expenses.[8]

[1] *Lady Stair, Petitioner*, 1882, 19 S.L.R. 618; *Lord Hamilton of Dalzell, Petitioner*, 1903, 40 S.L.R. 872; *cf. Lady Willoughby de Eresby* v *Callander & Oban Railway Co.*, 1885, 13 R. 70; *Carrick Buchanan* v *North British Railway Co.*, 1905, 12 S.L.T. 764 (both cases under Lands Clauses and Entail Acts).

[2] *Stirling Stuart* v *Caledonian Railway Co.*, 1893, 20 R. 932. See also *Glover, &c., Petitioners*, 1893, 30 S.L.R. 658.

[3] *Lord Hamilton of Dalzell* v *Caledonian Railway Co.*, 1914, 1 S.L.T. 477. See also *Pollok* v *Glasgow Waterworks Commissioners*, 1869, 41 Jur. 325; *Stirling Stuart* v *Caledonian Railway Co.*, 1893, 20 R. 932; *cf. Grant* v *Edinburgh, Perth, & Dundee Railway Co.*, 1851, 13 D. 1015. See also *Logan, Petitioner*, 1889, 26 S.L.R. 521.

[4] *Moncrieff* v *Edinburgh & Glasgow Railway Co.*, 1857, 19 D. 283.

[5] *Forbes* v *Caledonian Railway Co.*, 1886, 24 S.L.R. 212; *Stirling Stuart, Petitioner*, 1900, 8 S.L.T. 53.

[6] *Maitland, Petitioner*, 1882, 20 S.L.R. 35.

[7] 8 Vict. cap. 19, sec. 81.

[8] *Ibid.*, sec. 82.

(*b*) *Procedure.*—The Petition is printed, boxed, and lodged, and the first order is for service upon the promoters and for answers within eight days. At the expiry of the *inducicæ* the Petition is enrolled, and the Lord Ordinary is moved to find the promoters liable in the expenses set forth in the Petition as the same shall be taxed by the Auditor of Court. A remit is then made to the Auditor for taxation of the account of expenses, and the final interlocutor finds the promoters liable in the account of expenses as taxed, together with the expenses of the application and consequent procedure, including the expense of taxing the account and dues of extracting the said final interlocutor.

(*c*) *Expense of Taxation.*—The expense of taxing such expenses is borne by the promoters unless upon such taxation one-sixth part of the amount of such expenses is disallowed, in which case the expenses of such taxation, and of or incident to the application to the Lord Ordinary is borne by the party whose expenses are so taxed, and the amount thereof shall be ascertained by the Lord Ordinary and deducted by him accordingly in his judgment or decerniture.[1]

[1] 8 Vict. cap. 19, sec. 82.

CHAPTER XI.

RAILWAY AND CANAL VALUATION APPEALS.

(1) *Where Competent.*—Where a railway or canal company considers itself aggrieved by any entry in the valuation roll of railways and canals wherein such company is set forth either as proprietor, tenant, or occupier, it may lodge a note of appeal to the Lord Ordinary officiating on the Bills.[1]

A water, gas, or other company may after certain procedure have its lands and heritages valued by the assessor of railways and canals,[2] and the aforesaid provision as to appeal applies equally to such water, gas, or other company as have had its lands and heritages so valued.[3]

Any parish, county, or burgh having an interest in any valuation contained in the valuation roll of railways and canals may also appeal, and the Lord Ordinary on the Bills shall afford to the company to which such appeal applies an opportunity of answering such appeal, and also, if he thinks fit, afford such opportunity to the assessor of railways and canals or to any person whom he may consider to be interested in such appeal.[4]

Appeals must be lodged not later than 10th April and heard and determined not later than 15th May in each year.[5]

(2) *Form of Appeal.*—The appeal takes the form of a Note of Appeal which is usually printed. It is addressed to the Lord Ordinary on the Bills. The valuation fixed by the Assessor is first set forth, and the fact that the appellants object to and appeal against the said valuation. Then follows a prayer to alter and correct the said valuation, to sustain the objections or such other objections as may be competently stated; to find and declare that the valuation should be arrived at according to a

[1] Valuation of Lands (Scotland) Act, 1854 (17 and 18 Vict. cap. 91), sec. 24.
[2] *Ibid.*, sec. 23.
[3] *Ibid.*, sec. 24.
[4] *Ibid.*, sec. 25.
[5] Valuation of Lands (Scotland) Acts Amendment Act, 1894 (57 & 58 Vict. cap. 36), sec. 3.

certain method; to fix the valuation at a certain amount or such other sum, more or less, as shall on due inquiry be found to be the just and true amount of the same; and to appoint the valuation to be corrected accordingly. A statement of objections follows, and both the prayer and the statement of objections may be signed by a law agent.

(3) *Procedure.*—Intimation is ordered to be made to the Assessor, or to the company, as the case may be. The interlocutor is usually in the following terms:—

"Edinburgh, , 19 .—The Lord Ordinary officiating
"on the Bills appoints a copy of the note of appeal
"and statement of objections and of this deliverance
"to be served upon , the Assessor
"mentioned in the note of appeal (*or* the company, *as*
"*the case may be*) in terms of the Act 17 & 18 Victoria,
"chapter 91, and appoints parties to be heard on a day
"to be afterwards fixed."

The proceedings are summary and may be taken either in Court or at Chambers.[1]

An appellant is not entitled to a proof of his averments regarding over-valuation. A remit is made to a man of skill selected by the Court to inquire into and report on the matter in dispute.[2]

[1] Valuation of Lands (Scotland) Act, 1854, sec. 24.

[2] *Magistrates of Glasgow* v *Assessor of Railways*, 1858, 1 Poor Law Magazine, 282; *North British Railway Co.* v *Assessor of Railways*, 1887, 25 S.L.R. 4.

CHAPTER XII.

MISCELLANEOUS APPLICATIONS.

(1) *Petition for Appointment of an Arbiter under the Small Landholders (Scotland) Act,* 1911.—Where within twenty-one days after the receipt from the Land Court of an order under sub-section 11 of section 7 of the Act, a landlord or a tenant, as the case may be, intimates to the Land Court and to the Board of Agriculture for Scotland that he claims compensation to an amount exceeding £300 sterling, and desires to have the question whether damage or injury has been done entitling him to compensation, together with the amount of such compensation, settled by arbitration instead of by the Land Court, he may at any time within fourteen days after said intimation, failing agreement with the Board as to the appointment of an arbiter, apply to the Lord Ordinary on the Bills for such appointment, and the Lord Ordinary shall forthwith, on the receipt of such application, nominate a single arbiter to decide the questions aforesaid, whose award shall be final.[1]

A form of such Petition will be found in Connell on Small Landholders (Scotland) Act, 1911, at p. 187.

The Petition is in manuscript. There is no peculiar point to be observed in the procedure in this Petition. Any interlocutor pronounced therein may be reclaimed against within fourteen days.

(2) *Special Case under the Small Landholders (Scotland) Act,* 1911.—By section 7 (11) of the above Act, section 9 of the Second Schedule to the Agricultural Holdings (Scotland) Act, 1908, is made to apply to an arbitration under the Small Landholders (Scotland) Act, 1911, with the substitution of the Lord Ordinary on the Bills for the Sheriff. Accordingly, the arbiter may at any stage of the arbitration, and shall, if so directed by the Lord Ordinary on the Bills (which direction may be given

[1] 1 & 2 Geo. V. cap. 49, sec. 7 (11).

on the application of either party) state in the form of a special case for the opinion of the Lord Ordinary on the Bills any question of law arising in the course of the arbitration. The special case is stated by the arbiter, and after reciting the facts states the contentions of parties, and the question or questions of law upon which a judgment is desired. The contentions of parties and the question or questions of law are adjusted after consultation with the parties. It has been decided that the judgment of the Lord Ordinary on the Bills is not subject to review.[1]

(3) *Special Application for Arrestment of a Ship in order to Work out a Maritime Lien.*—Where a person, who has or claims a right to a maritime lien over a vessel, is desirous of arresting the vessel in order to work out his maritime lien, an ordinary arrestment on the dependence of an action is not sufficient. It is necessary that a special application should be made to the Court for arrestment of the vessel.[2] Formerly such an application was made in the Inner House by Petition,[3] but now it may be made to the Lord Ordinary on the Bills.[2] In a recent case the application was made to the Lord Ordinary on the Bills by manuscript Petition, in which it was set forth that the petitioner was the holder of a promissory note granted by the master of a vessel for necessary repairs, that payment of the promissory note was to be made ten days after arrival of the vessel at the port where her voyage terminated, that the ship had arrived at said port and discharged her cargo and was preparing to depart without payment of said promissory note and in order to defeat the petitioner's maritime lien. The prayer of the Petition was as follows:—

> "May it therefore please your lordship to grant warrant to "Messengers-at-Arms to fence and arrest the said "steamship at present lying in the James Watt "Dock, Greenock, her hull, keel, engines, spars, sails "and stores with her float boats, furniture and apparel- "ling, all to remain under sure fence and arrestment "at the instance of the petitioner aye and until "sufficient caution and surety be found acted in your

[1] *Cathcart* v *Board of Agriculture*, 1915, S.C. 166.

[2] *Clan Line Steamers, Ltd.*, v *Earl of Douglas Steamship Co., Ltd.*, 1913, S.C. 967, L.P. Dunedin, p. 973.

[3] *Lucovich, Petitioner*, 1885, 12 R. 1090.

"lordship's books that the same shall be made forth-
"coming to the petitioner as accords of law, and to
"grant authority for putting the said warrant into all
"lawful execution to the dismantling of the said
"steamship if necessary and all upon a copy of your
"lordship's deliverance certified by the Clerk of Court
"or to do further or otherwise in the premises as to
"your lordships shall seem proper."

The Lord Ordinary on the Bills reported the Petition to the First Division and the latter instructed the Lord Ordinary on the Bills to grant the prayer of the Petition in terms of the interlocutor pronounced in the case of *Lucovich*.[1] This was accordingly done, with the exception of the order for intimation on the walls and in the Minute Book, which is an order inappropriate in the Bill Chamber.

(4) *Petition for Authority to Register English or Irish Judgments after the Expiry of Twelve Months from date of Judgment.*—Where more than twelve months have elapsed after the date of a judgment obtained or entered up in the High Courts of England or Ireland, a certificate of such judgment cannot be registered for execution in "The Register for English "and Irish Judgments," unless application has been first made to, and leave obtained from, the Lord Ordinary on the Bills.[2]

The application is by manuscript Petition which is addressed and presented to the Lord Ordinary on the Bills. It recites the judgment and where it was obtained, and states that the petitioner has obtained a certificate of said judgment for registration under the Judgments Extension Act, 1868; that he is desirous of having said certificate registered in terms of section 2 of said Act, but that more than twelve months have elapsed since the date of said judgment.

The prayer of the Petition is in the following terms:—

"May it therefore please your lordship to authorise the
"Keeper of the Register of English and Irish Judg-
"ments to register the foresaid certificate of judgment
"in terms of the Judgments Extension Act, 1868; or
"to do further or otherwise in the premises as to
"your lordship shall seem proper."

The *inducice* of charge upon the extract certificate are fifteen

[1] *M'Connachie, Petitioner*, 1914, S.C. 853. See *Lucovich, Petitioner*, 1885, 12 R. 1090.

[2] Judgments Extension Act, 1868, sec. 2; *English's Coasting and Shipping Co., Ltd.* v. *British Finance Co., Ltd.*, 1886, 14 R. 220.

days, and the fees for registration and extract are the same as those exacted upon extracts of deeds recorded in the Books of Council and Session.[1] A fee of two shillings is payable for each certificate issued, and no fee fund dues are chargeable upon such certificates.[2]

(5) *Note for a Warrant to Inventory in an Action of Poinding of the Ground.*—As the service of a summons of poinding of the ground creates a *nexus*, a warrant to inventory the effects should be obtained, so as to preserve evidence of what has been attached.[3] Where this is desired an application can be made to the Lord Ordinary on the Bills in the form of a note.[3] The note should set forth the signeting of a summons of poinding of the ground and its service. The conclusions of the summons should be stated, and that the pursuer in the cause desires a warrant to inventory any goods and effects which may have been attached by such service. The prayer of the note may be in the following terms:—"May it therefore please your lordship "to grant warrant to Messengers-at-Arms to enter upon the said "subjects and buildings above referred to and fully described in "the summons, and to make up and deliver to the said pursuer a "full and complete inventory of the whole goods, gear, and all "moveable effects thereon and therein, and for that purpose to "grant warrant to them to open lockfast places.[4]"

(6) *Note for Warrant to bring Vessel into Safe Harbour.*—Where a summons has been signeted which contains a warrant to arrest and dismantle a vessel which is subject to the jurisdiction of the Scottish Courts, and it is discovered that the vessel does not lie in a safe harbour so that the vessel can be dismantled in order to disable her from leaving the jurisdiction of the Court, a written note may be presented to the Lord Ordinary on the Bills setting forth these facts and craving the Lord Ordinary "to grant a warrant to messengers-at-arms, and other officers of "Court to bring the said vessel from , or wherever "else she may be, within the jurisdiction of the Court into the "harbour at , and being in a safe harbour to take "the sails, rudders, and anchors from said vessel and also such "part of her engines or machinery as would disable her from "proceeding to sea all in terms of the will of the summons."

[1] C.A.S., B. vi. 5; C.A.S., K. vi. 1.
[2] C.A.S., B. vi. 5; C.A.S., K. vi. 2.
[3] Graham Stewart on Diligence, p. 500.
[4] *Workman, Petitioner*, May, 1910, Lord Cullen (unreported).

The interlocutor pronounced on the Petition is usually in the following form:—"Edinburgh, , 19 .—The Lord "Ordinary having considered the note grants warrant to messen- "gers-at-arms and officers of Court to bring the vessel when "arrested from , or wherever else she may be, within "the jurisdiction of the Court into the harbour at ."

(7) *Bills for Letters of Loosing Arrestments.*[1]—Besides proceeding by way of Petition for recall of arrestments it is competent to proceed by way of letters of loosing arrestments passing under the Signet. Procedure by letters of loosing is, however, almost obsolete, and it is noticeable that the Act of Sederunt, 11th July, 1826, under which the distinction between letters of special loosing and of general loosing is made, is omitted from the Codifying Act of Sederunt of 1913.

There are five classes of letters of loosing of arrestment, and in each case procedure begins by a Bill presented in the Bill Chamber, and in each case caution or consignation varying in degree must be found. A Bill for letters of loosing is peculiar in that it must be signed by a Writer to the Signet, so must also the letters of arrestment. Forms of Bills and Letters may be found in Juridical Styles, vol. iii., p. 316 *et seq.*

The five classes of letters are as follows:—

(*a*) *Letters of Special Loosing of Arrestments used in Security or on Dependence.*—These are used where a particular arrestment has been made in the hands of a person or persons named in the arrestment. Caution must be found by a bond in the terms in use in the Bill Chamber prepared by the Clerk of the Bills. No intimation is required to the arrester. On presentation the Bill is passed by an interlocutor of the Lord Ordinary on the Bills, and when caution has been found to the satisfaction of the Clerk of the Bills, the latter writes his *fiat* on the Bill and the letters are signeted in the Signet Office.

(*b*) *Letters of Special Loosing of Arrestments used in Execution.*—These are competent where arrestment has proceeded upon a decree either actual or of registration. In the ordinary case, consignation must be made, and the party applying for such loosing

[1] Graham Stewart on Diligence, p. 204 *et seq.*

must state in his Bill that he has brought, or is about to bring, a suspension or reduction of the arrestment. Where, however, the arrestment is already under suspension, or the obligation is not liquid, or the term of payment of the decree has not arrived, loosing may be granted on caution being found. No intimation is required to the arrester.

(*c*) *Letters of General Loosing of Arrestments used on Dependence of an Action concluding for a Specified Sum.*—The caution required is *judicatum solvi.* Intimation must be made forty-eight hours before presenting the Bill, either to the arrester or his known agent. There must be produced to the Clerk of the Bills along with the Bill a copy certified by the Extractor of the Signet of the Bill on which the letters of arrestment sought to be loosed were issued, and also a certificate of intimation.[1]

It is also competent to ask for a general loosing although the arrestments are in execution.[2]

(*d*) *Letters of General Loosing of Arrestments used on Dependence of an Action concluding for a Random Sum.*—In this case the party asking for loosing may offer in general terms to find caution to such extent as the Lord Ordinary on the Bills may judge sufficient. The Lord Ordinary may thereupon, after further intimation to the arrester, if he shall judge it necessary and after allowing him an opportunity to be heard for his interest, pass the Bill on such caution as he shall judge reasonable.[3]

(*e*) *Letters of Loosing of Arrestments used ad fundandam jurisdictionem.*—The caution is *judicio sisti.*

(8) *Petitions to have Mid-superiority Declared Forfeit.*—These Petitions may be presented by virtue of sections 104 and 105 of the Titles to Land Consolidation (Scotland) Act, 1868,[4] and the forms of the Petitions and the several interlocutors are to be found in Schedules X and Y annexed to said Act. It is usual to print these Petitions although they are applications in the Bill Chamber.

[1] A.S., 11th July, 1826, secs. 2 and 3.
[2] *Smith* v *Macintosh*, 1848, 10 D. 455.
[3] A.S., 11th July, 1826, sec. 4.
[4] 31 & 32 Vict. cap. 101.

CHAPTER XIII.

APPLICATIONS DISPOSED OF BY THE CLERK OF THE BILLS.

(1) *Fiats.*—(*a*) *Minutes for Warrants under the Personal Diligence Act, 1838.*

(i.) *Generally.*—It is essential that the place and date of presentation be prefixed to the Minute in terms of the schedules annexed to the Act.[1] In a recent suspension of a charge the objection was taken by the suspender that the Minute did not bear the place and date of presentation. When the note was passed for the trial of the cause in the Outer House, Lord Hunter considered that as an Outer House Judge he was bound by the cases above quoted, at the same time indicating that it was doubtful whether the Inner House would now be inclined to follow them. The suspender accordingly withdrew the said objection.[2]

(ii.) *Warrant to Imprison.*—On the execution of a charge on a decree being recorded and a certificate of the registration thereof written on the extract by the keeper of the register, if a warrant to imprison be required, a Writer to the Signet must endorse and subscribe on the extract a Minute in the following terms:—

"(*Place and date*)

"The charge having expired and registered as per "execution and certificate produced, warrant is craved "to search for, take, and apprehend the person of the "said A (*specify name of debtor or obligant*) and "being so apprehended to imprison him within a "tolbooth or other warding place, therein to remain

[1] *Sim* v *Yuile*, 1845, 8 D. 8; *Jameson* v *Wilson*, 1853, 15 D. 414.

[2] *Scott* v *Davidson*, 1913, Lord Hunter (unreported).

"until he fulfil the said charge, and if necessary for "that purpose to open shut and lockfast places; and "warrant also to magistrates and keepers of prisons to "receive and detain the said A accordingly.

"(Signed) A B, W.S."

The extract, with the execution and certificate of registration and endorsed Minute, is presented in the Bill Chamber, and the Clerk of the Bills shall, if there be no lawful cause to the contrary, write on the extract this deliverance "*Fiat ut petitur*," and shall date and subscribe the same.[1]

(iii.) *Warrant at the Instance of a Person Acquiring Right to Extract.*—Where a person acquires right to an extract of a decree, it is competent to him to present in the Bill Chamber the extract with the execution of charge (if a charge has been given) and certificate of registration (if the same has been registered) and a Minute endorsed thereon subscribed by a Writer to the Signet, with the assignation, confirmation, or other legal evidence of such acquired right, praying for authority to arrest, charge, poind the effects or to imprison the debtor or obligant and open shut and lockfast places, as the case may be. The Minute is in the following terms:—

"Warrant is craved (*state what is prayed for*) at "the instance of (*specify name and designation of "the applicant*) as (*assignee or otherwise as the case "may be*) of (*specify the name and designation of the "person at whose instance the extract was issued*). "Produced herewith (*assignation or confirmation, or "other legal evidence of the acquired right, as the case "may be*). Dated the day of "
(*and if for imprisonment, execution of expired charge and certificate of registration shall be produced and warrant craved as in the preceding Minute.*)

If there is no lawful cause to the contrary the Clerk of the Bills shall write on the extract this deliverance "*Fiat ut petitur*," and he shall date and

[1] 1 & 2 Vict. cap. 114, sec. 6 and schedule No. 4.

subscribe the same and endorse the same date on the documents produced, and subscribe with his initials the date so endorsed.[1]

(iv.) *Warrant of Concurrence.*—Where a debtor or obligant is, or his moveables are, within the territory of any other Sheriff than the Sheriff from whose books an extract decree is lawfully issued, it is competent to present the extract in the Bill Chamber with a subscribed Minute endorsed thereon in the following terms:—

"(*Place and date.*)

"Warrant of concurrence by the Lords of Council "and Session is craved at the instance of (*specify "name and designation of applicant*) for executing "the within warrant against the within designed "(*specify the name of the debtor or obligant*).

"A B"

and if there is no lawful cause to the contrary, the Clerk of the Bills shall grant authority accordingly by writing this deliverance "*Fiat ut petitur*" and dating and subscribing the same.[2]

(*b*) *Minute for Warrant to Charge an Heir or Disponee under a Personal Obligation by his Ancestor or Author.*—"Warrant is craved, in virtue of 'The Con- "'veyancing (Scotland) Act, 1874,' at the instance of "*A B* (*name and design applicant*) the creditor [*if he* "*is not the original creditor or only a partial creditor* "*add*, in virtue of (*or* to the extent and in virtue of) "the assignation (*or* general disposition and notarial "instrument, *or other writ or writs forming the title* "*in the creditor's person*) in his favour after- "mentioned] under a bond and disposition in security "over the lands of (*specify shortly the lands*) for the "principal sum of £ , with corresponding interest "and penalties, granted by *C D* (*design him*) then pro- "prietor of the said lands, in favour of the said *A B* "(*or of G H* (*design him*) *as the case may be*), and "dated (*state date*) (*and if recorded say*, and recorded "in the Register of Sasines (*state register and date of*

[1] 1 & 2 Vict. cap. 114, sec. 7 and schedule No. 5.

[2] 1 & 2 Vict. cap. 114, sec. 13 and schedule No. 10.

"*recording*) *or* and instrument of sasine thereon "recorded, &c., *as the case may be;* to charge *E F* "(*design him*), the present proprietor of the said lands, "and as such the present debtor in the said bond and "disposition in security, to make payment to the said "*A B* of the said principal sum of £ , contained "in and due by the said bond and disposition in "security (*if A B is only a partial creditor say,* of "the principal sum of £ , being the extent to "which the said *A B* is in right of the said bond and "disposition in security); and also of the further sum "of £ , being the amount of the interest now "due thereon. Produced herewith the said bond and "disposition in security (*or an extract thereof from the* "*Books of Council and Session or from the Register* "*of Sasines; if the applicant is not the original* "*creditor, the title in his own person to the security* "*will also be stated and produced.*)

"Dated the day of

"(Signed) A B, W.S., Edinburgh.

"(*Or as the case may be.*)

"*Fiat ut Petitur.*

"(Signed)

"Clerk of the Bills.[1]

"Bill Chamber,

"Edinburgh, 19 ."

(*c*) *Warrant to Dismantle.*—Where a summons contains a warrant to arrest a ship on the dependence of an action, and a warrant to dismantle is afterwards required, this is obtained by presenting the signeted summons containing the warrant to arrest to the Clerk, or to the Assistant Clerk, of the Bills,[2] who writes thereon:—

"Bill Chamber,

"Edinburgh, 19 .

"The Lords grant warrant to dismantle arrested "vessels, the same being in safe harbour.

"(Signed)

"Clerk of the Bills."

[1] Conveyancing (Scotland) Act, 1874, sec. 47 and schedule K.

[2] C.A.S., E. III. 3.

(*d*) *Bills for Letters of Arrestment.*—As a warrant to arrest is usually inserted in the will of a summons, and is always to be found in an extract decree, letters of arrestment are not so commonly used as formerly. There are certain cases, however, in which they are still competent:—

(i.) Where there is no warrant in the will of the summons;

(ii.) Where arrestment is desired by the holder of a liquid but unregistered document of debt which is past due;

(iii.) Where desired by the holder of a liquid document of debt which is not due but where the debtor is *vergens ad inopiam;*

(iv.) Where a defender has been found entitled to expenses but has not got a decree, and the pursuer is *vergens ad inopiam.*

In all cases the procedure is by a Bill in the Bill Chamber. The Bill is in the following terms:—

"My Lords of Council and Session, unto your "Lordships humbly shews your servitor, *A*, com- "plainer, that (*here narrate verbatim the ground of "debt or other warrant for the arrestment, as in the "letters*), as the said bond (*or* bill, registered protest, "extract decree, *or* libelled summons, *as the case "may be*), here to show will testify.

"Herefore, the complainer beseeches your Lord- "ships for letters of arrestment at his instance in the "premises in common form (*if warrant to arrest in "the hands of persons furth of Scotland is wanted, "add* containing warrant to arrest in the hands of "persons furth of Scotland).

"According to Justice, &c.

"C D's Bill."

C D is the name of the Writer to the Signet who signs the Signet Letters, but the Bill does not require to be signed by him.

In case (i.) there is produced to the Clerk of the Bills along with the Bill the principal or certified copy[1] summons. In cases (ii.) and (iii.) the liquid

[1] C.A.S., E. III. 2.

document of debt is produced, and a special averment must be made in the letters, and consequently in the Bill, appropriate to case (iii.) that the debtor is *vergens ad inopiam.* In case (iv.) a certified copy[1] of the interlocutor finding the defender entitled to expenses is produced, and an averment made in the letters, and consequently in the Bill, that the pursuer is *vergens ad inopiam.*

On the production of the Bill to the Clerk of the Bills along with the production appropriate to the occasion, the Clerk of the Bills writes upon the Bill "*Fiat ut petitur,*" and adds the words appropriate to the occasion, together with the date and place. Thus—"*Fiat ut petitur,* because the Lords have seen "the Bill (*or* interlocutor, *or as the case may be*)." The *fiat* must be valid and regular otherwise the proceedings will be void.[2]

Prior to the presentation of the Bill, letters of arrestment are prepared by an agent and signed by a Writer to the Signet. The Bill containing the *fiat* is taken with the letters of arrestment to the Signet Office where the Bill is retained and the letters of arrested signeted and handed out.

Forms of the several kinds of letters of arrestment are to be found in Juridical Styles, vol. iii., pp. 302-5.

(*e*) *Bills for Letters of Arrestment ad fundandam jurisdictionem.*—Where letters of arrestment are required in order to found jurisdiction the procedure is by Bill in the Bill Chamber. Letters of arrestment in the form to be seen in Juridical Styles, vol. iii., p. 305, are written out by an agent and signed by a Writer to the Signet. A Bill in the form set forth in the preceding paragraph is prepared and presented to the Clerk of the Bills without any production, and upon the Bill the Clerk of the Bills writes "*Fiat ut "petitur.*" The Bill and letters of arrestment are then taken to the Signet Office where the Bill is retained and the letters of arrestment signeted and given out.

[1] C.A.S., E. III. 2.
[2] *Forbes* v *Gallie,* 1847, 9 D. 806; *MacKenzie* v *Cameron,* 1853, 15 D. 664, per L.P. M'Neill.

The same procedure is followed where letters of arrestment of a ship *ad fundandam jurisdictionem* are required. A form of such letters may be found in Juridical Styles, vol. iii., p. 306.

(*f*) *Bills for Letters of Inhibition.*—Letters of inhibition are competent (i.) where the original summons does not contain a warrant to inhibit; (ii.) where an action is unnecessary; and (iii.) where there is a future or contingent debt and the debtor is *vergens ad inopiam.*

Forms of the several kinds of letters of inhibition are to be found in Juridical Styles, vol. iii., p. 272 *et seq.*[1] They must be signed by a Writer to the Signet. After the letters have been prepared in the appropriate form and signed, a Bill is prepared in the following terms;—

"My Lords of Council and Session,—Unto your "Lordships humbly shews your servitor *A* (*desig-* "*nation*) complainer (*here copy the statement of the* "*ground or document of debt upon which the com-* "*plainer proceeds, as in the letters, with of course the* "*necessary alterations*) as the said bond (*or* bill, *or* "*otherwise as the case may be*) here to show will "testify.

"Herefore, the complainer beseeches your Lord- "ships for letters of inhibition at his instance in the "premises in common form.

"According to Justice.

"C D's Bill."

The Bill does not require to be signed by the Writer to the Signet (*C D*), the words "C D's Bill" being filled in by the writer of the Bill. It is then presented to the Clerk of the Bills with such production as is necessary, as in procedure for letters of arrestment, and the Clerk of the Bills writes "*Fiat* "*ut petitur*" upon the Bill, adding the phrase "because the Lords have seen the Bill (*or as the case may be*).[1] In cases of doubt or difficulty the Clerk of the Bills reports the matter to the Lord Ordinary,[2] and sometimes the Lord Ordinary reports to the Court.[3]

[1] Titles to Land Consolidation (Scotland) Act, 1868, sec. 156 and schedule Q.Q.; C.A.S., E. III. 1 & 2.

[2] 53 Geo. III. cap. 64, sec. 17.

[3] *Lamont, Complainer*, 1867, 6 M. 84.

After the *Fiat* is written on the Bill, the letters of inhibition and the Bill are taken to the Signet Office where the letters are signeted and the Bill is retained.

(*g*) *Bills for Letters of Horning, of Horning and Poinding, and of Caption.*

(i.) *Generally.*—Although an extract decree contains a warrant to charge, poind, and imprison, it is still competent to proceed by way of letters of horning, of horning and poinding, and of caption. Where the latter are used in such cases no expense can be recovered except the expense of extract, unless the party using the same can show that procedure by way of the warrant contained in the extract is incompetent.

Letters of horning are appropriate where the obligation is one *ad factum præstandum*. Letters of horning and poinding are proper where the obligation is to pay money. Letters of caption are appropriate where the debtor has refused to obey a previous charge of horning in such cases as the debtor can be imprisoned. Letters of horning and poinding are sometimes used in order to reduce the *inducice*, where the debtor resides in Orkney or Shetland, from forty days to fourteen days.

(ii.) *Letters of Horning and of Horning and Poinding.*—These letters proceed upon decrees, whether actual or of registration, and can only be obtained on a bill being presented in the Bill Chamber. The letters are first prepared in the form appropriate to the occasion. Forms of different kinds of letters of horning and of horning and poinding may be found in Juridical Styles, vol. iii., p. 345, *et seq.* These require to be signed by a Writer to the Signet. A bill is then prepared in the following terms:—

"My Lords of Council and Session,—Unto your "lordships humbly shows your servitor A (*name "and designation*), complainer, that B by his "bond, &c. (*here repeat the narrative set forth in "the letters, with the necessary alterations*) as the "said extract registered bond, &c., will testify.

"Herefore the complainer beseeches your Lord-"ships for letters of horning (*or* letters of horning "and poinding) as his instance in common form "(*if required, add*—and containing a warrant to "charge the said B as furth of Scotland; *also, if* "*required*, and warrant to arrest in the hands of "persons furth of Scotland). According to Justice.

"C D's Bill."

Where the document of debt is a decree of the Court of Session a Bill is not required. The Bill does not require to be signed by a Writer to the Signet; the actual writer of the Bill adds "C D's "Bill," C D being the name of the Writer to the Signet who signed the letters. The Bill is then presented to the Clerk of the Bills who writes thereon "*Fiat ut petitur*, because the lords have "seen the extract registered bond and assignation," or as the case may be. The Bill and letters are then taken to the Signet Office where the letters are signeted and the bill is retained.[1]

(iii.) *Letters of Caption.*—Letters of caption are only issued after a Bill has been presented in the Bill Chamber. First, letters of caption are prepared and signed by a Writer to the Signet. A form of letters of caption may be found in Juridical Styles, vol. iii., p. 372. A Bill is then prepared in the following terms:—

"My Lords of Council and Session,—Unto your "lordships humbly means and shews your servitor "A (*design*), complainer, that upon the "day of (*date of execution of* "*denunciation*) B (*design*) was orderly denounced "rebel and put to the horn, by virtue of letters of "horning raised and executed at the complainer's "instance against him, for not (*here copy the* "*particulars of the charge, as in the letters*) in "manner more fully mentioned in the said letters "of horning as the same, with the executions "thereof duly registered, here to show, will testify.

[1] Graham Stewart on Diligence, p. 287.

"Herefore the complainer beseeches your Lord-"ships for letters of caption at his instance in the "premises in common form. According to Justice,
"C D's Bill."

C D, who is the Writer to the Signet who signs the letters of caption, need not sign the Bill. "C D's Bill" is written by the writer of the bill. The Bill is then presented in the Bill Chamber. Along with the bill are produced the letters of horning, the executions of the charge thereon and denunciation, and a certificate of registration of the same. The Clerk of the Bill then writes upon the Bill "*Fiat ut petitur;* because the Lords have "seen the registered horning." Thereafter the Bill and the letters of caption are produced in the Signet Office. The Bill with the *fiat* is the warrant to the Keeper of the Signet to affix the signet. The letters are accordingly signeted and the Bill retained in the Signet Office.[1]

(*h*) *Bills for Letters of Open Doors.*—Letters of open doors are necessary where letters of horning and poinding have been used and an execution of lockfast doors has been returned. On production of the two latter documents in the Bill Chamber along with a Bill, the Clerk of the Bills writes a *fiat* on the Bill. The Bill thereupon becomes a warrant for signeting letters of open doors, a form of which may be found in Juridical Styles, vol. iii., p. 374. The letters must be signed by a Writer to the Signet. The letters and Bill are produced in the Signet Office, where the letters are signeted and the Bill retained.[2]

(*i*) *Bills for Letters of Ejection.*—These are competent where a tenant, who has been decerned to remove from a farm and still continues in occupation, has had a charge or letters of horning executed against him and registered. To obtain letters of ejection, a Bill must be presented in the Bill Chamber, on which the Clerk of the Bills writes a *fiat*, after which the Bill

[1] Graham Stewart on Diligence, p. 708.

[2] Graham Stewart on Diligence, p. 350.

and letters are presented at the Signet Office where the letters are signeted and the Bill retained. Forms of Bill and letters are to be found in Juridical Styles, vol. iii., 377-9.

(*j*) *Bills for Letters of Supplement.*—Where a debtor in a bond is abroad and an assignee wishes to intimate his assignation, or where a trustee resigns and wishes to intimate his resignation to a co-trustee whose address he cannot find, the procedure is by letters of supplement. These are obtained by means of a Bill presented in the Bill Chamber. The letters of supplement are first prepared. Forms are to be found in Juridical Styles, vol. iii., p. 379, *et seq.* A Bill is then prepared in the following terms:—

"My Lords of Council and Session,—Unto your Lordships "humbly shews your servitor *A*, complainer, that "by bond (*or* trust disposition and settlement, *or* "as the case may be) (*here copy the narrative set* "*forth in the letters.*)

"Herefore the complainer beseeches your Lord- "ships for letters of supplement at his instance in "the premises, in common form;

"According to Justice, &c.,

"C D's Bill."

The letters are signed by a Writer to the Signet. The Bill, however, does not require such a signature.

The procedure is the same as in letters of arrestment, &c.

(*k*) *Bills for Letters of Loosing of Arrestments.*—After caution has been found to the satisfaction of the Clerk of the Bills, or consignation has been made, the Clerk of the Bills writes his *fiat* on the Bill which is a warrant to affix the signet to the letters of loosing.

(2) *Abbreviate of Bankrupt's Discharge.*—After a deliverance has been pronounced finding a bankrupt entitled to his discharge, and the Lord Ordinary grants his discharge, an extract of the latter deliverance signed by the Clerk of the Bills is transmitted to the Accountant of Court for preservation, and an

abbreviate of the deliverance of discharge issued by the Clerk of the Bills in the Form of Schedule E, No. 4, annexed to the Bankruptcy (Scotland) Act, 1913.[1]

(3) *Recording Orders Pronounced in England or Ireland under the Companies Consolidation Act, 1908, and the Bankruptcy Act, 1883.*

(*a*) *Registration.*—On production to the Clerk of the Bills of an office copy of any order made by any of the Courts having jurisdiction in bankruptcy in England or Ireland respectively under the bankruptcy statutes —or of any order made by the Courts in England or Ireland respectively for or in course of the winding up of any company under the Companies Acts, the same shall be registered *in extenso* in a register to be kept for that purpose in the office of the said Clerk, on payment of a fee of 5s., and the register shall be open to inspection of all concerned on payment of a fee of 2s. 6d.[2]

(*b*) *Certificate.*—After registration as aforesaid, the Clerk of the Bills shall append to such office copy a certificate subscribed by him of the registration thereof in the following terms :—

"Registered in terms of the Act 8 Edw. VII. cap. "69 (*or* 46 & 47 Vict. cap 52, *as the case may be*), "and relative Act of Sederunt, C.A.S., E. IV. 1.

"Clerk of the Bills.

"Bill Chamber,

"Edinburgh, 19 ."

and the same being so registered and certified shall be a sufficient warrant to officers of Court to charge for payment of the sums recoverable under such order, and of the expense of registering the same, and to use any further diligence that may be competent, in the same manner as if such order had been a decree originally pronounced in the Court of Session on the date of such registration as aforesaid.[3]

(4) *Bonds of Caution.*—It is the province of the Clerk of the Bills to prepare all bonds of caution lodged in the Bill Chamber in purely Bill Chamber causes, such as suspensions, suspensions

[1] Bankruptcy (Scotland) Act, 1913, sec. 145.

[2] C.A.S., E. IV. 1 (*a*).

[3] C.A.S., E. IV. 1 (*b*).

and interdict, suspensions and liberation, bills for loosing arrestment,[1] and sequestrations.[2]

The Clerk of the Bills is responsible for the due and faithful execution of his duty in receiving or rejecting cautioners according to the rules of common law and justice applicable to the circumstances of the case.[3]

The Court will not interfere with the exercise of the discretion of the Clerk of the Bills in the matter of caution.[4]

Bonds of caution in all Petitions to the Junior Lord Ordinary, although dealt with in the Bill Chamber are prepared by the agent[5] and received by the Accountant of Court.[6]

(5) *Interim Act and Warrant of Factor in a Sequestration.*—Where in a sequestration an *interim* factor is appointed until such time as a trustee is elected,[7] the Clerk of the Bills may issue an *interim* Act and Warrant after being satisfied with the factor's bond of caution. In practice, however, a copy of the interlocutor making the appointment certified by the Clerk of the Bills is sufficient.[8]

(6) *Extracts.*—In purely Bill Chamber proceedings, such as suspensions and interdicts,[9] and bankruptcy petitions,[10] the Clerk of the Bills is his own extractor,[11] except in the case where a Note of Suspension, interdict, suspension and interdict, or suspension and liberation has passed without appearance being entered or answers lodged, in which case the Lord Ordinary may award expenses against the respondent and decern for the taxed amount thereof, and the process may be transmitted to the extractor in the Court of Session.[12]

The form of the extract is the same as in the Court of Session, and contains the necessary warrant to charge and do diligence against the party against whom the decree is pronounced.

In the Court of Session the rule is that decrees may be extracted on the expiry of twenty-four hours after reading in the minute book, *i.e.*, on the eighth day free of the date of the

[1] A.S., 14th June, 1799, sec. 3; C.A.S., E. II. 11; Beveridge, p. 37, sec. 166.
[2] Antonio, p. 379.
[3] A.S., 14th June, 1799, sec. 9; 1 & 2 Vict. cap. 118, sec. 14; A.S., 24th December (Bill Chamber), 1838, sec. 14.
[4] *Gow* v *Napier*, 1832, 10 S. 812.
[5] Antonio, pp. 139, 144.
[6] C.A.S., G. I. 4.
[7] Bankruptcy (Scotland) Act, 1913, secs. 14.
[8] Antonio, p. 379.
[9] Mackay's Manual, p. 315.
[10] A.S., 10th February, 1858, sec. 5; C.A.S., E. II. 27.
[11] A.S., 15th July, 1842, secs. 4 and 5; *Morison* v *M'Kirdy*, 1842, 4 D. 563, 564; *Clippens Oil Co., Ltd.* v *Edinburgh and District Water Trustees*, 1906, 8 F. 731, per L.P. Dunedin, 749.
[12] C.A.S., E. II. 25.

decree,[1] unless the process has been previously borrowed for the purpose of reclaiming.[2] Reading in the minute book may also be dispensed with.

In the Bill Chamber it is the practice for the Clerk of the Bills to issue extract immediately after a decree has been pronounced which cannot be reclaimed against, unless prohibited by the Lord Ordinary from so doing; and not to issue extract, where the decree may be reclaimed against, until the expiry of fourteen days from the date of decree. In causes disposed of in the Bill Chamber by virtue of the Distribution of Business Act, 1857,[3] and the Clerks of Session Regulation Act,[4] all interlocutors are transmitted to the extractor of the Court of Session for extract.[5]

Certificates of no caution are issued by the Clerk of the Bills without any warrant from the Lord Ordinary.[6]

(7) *Caveats.*—A caveat is a document lodged by a person apprehensive that some proceeding may be taken against him in the Bill Chamber in which, on an *ex parte* application, a warrant or decree may be pronounced. Its object is to provide for intimation being made by the Clerk of the Bills to the party lodging the document of the presentation of such an application so that the party lodging the caveat may be heard before any interlocutor is pronounced thereon. Caveats may be either general or particular. In the former case, the caveat provides for notice being given of any application competent to the Bill Chamber at anybody's instance against the party lodging the caveat, and certain railway companies and corporations adopt this method. In the latter case, the particular proceeding of which the presenter of the caveat is apprehensive alone is mentioned. Thus, "Should any application for suspension (*or, as "the case may be*) be presented at the instance of A B against "C D, it is requested that notice be given to the subscriber before "any order is pronounced thereon."

[Signed by C D's Agents.]

[Agent's Address and Date.]

In either case a caveat only endures for one month, but it may be renewed from time to time by the presenter calling at the Bill Chamber and altering the date, at the same time paying the fee fund dues.

[1] A.S., 20th January, 1671; A.S., 5th June, 1725.

[2] Regulations of Extractor in the Court of Session, dated August, 1907, sec. IX.

[3] 20 & 21 Vict. cap. 56.

[4] 52 & 53 Vict. cap. 54.

[5] *Ibid.*, sec. 3.

[6] *Nairne* v *Spence*, 1824, 3 S. 228 (N.E. 160).

CHAPTER XIV.

APPLICATIONS IN VACATION.

The following applications may be dealt with by the Lord Ordinary on Bills during vacation:—

(i.) Petitions transferred to the Junior Lord Ordinary under the Distribution of Business Act, 1857, sec. 4;[1]

(ii.) under the Judicial Factors Act, 1849;[2]

(iii.) for discharge or removal of Judicial Factors;[3]

(iv.) for the protection of married women's property;[4]

(v.) under the Trust Act, 1867;[5]

(vi.) for possession or specific performance;[6]

(vii.) to presume a person to be dead;[7]

(viii.) for the recall of arrestment[8] or inhibition;[9]

(ix.) for the appointment of certain umpires[10] and oversmen;[11]

(x.) for commission and diligence for taking, to lie *in retentis* subject to the orders of Court, the examination of witnesses whose evidence owing to great age (not under 70 years), or to severe indisposition, or to their intending to go abroad and to remain abroad for a considerable period, is in danger of being lost;[12]

(xi.) for orders upon witnesses out of the jurisdiction to appear before the Court of Session;[13]

(xii.) for orders upon witnesses in Scotland to appear before commissions granted by Courts of law and equity in England and Ireland;[14]

[1] Clerks of Session (Scotland) Act, 1889, sec. 3. See also Distribution of Business Act, 1857, sec. 10; Entail Amendment Act, 1875, secs. 3 and 12.

[2] Secs. 1, 7, 8, and 34.

[3] *Kyle, &c., Petitioners*, 1862, 24 D. 1083, per L.J.C. Inglis, p. 1085. See also *Souter* v *Finlay*, 1890, 18 R. 86.

[4] Conjugal Rights (Scotland) Amendment Act, 1861, sec. 1.

[5] Section 16; *Staveleys, Petitioners*, 1883, 20 S.L.R. 565.

[6] Court of Session Act, 1868, sec. 91.

[7] Presumption of Life Limitation (Scotland) Act, 1891, sec. 12.

[8] 1 & 2 Vict cap. 114, sec. 20; *Morison* v *Rennie*, 1847, 10 D. 146.

[9] 31 & 32 Vict. cap. 101, sec. 158.

[10] Companies Clauses Consolidation (Scotland) Act, 1845, secs. 3 and 134.

[11] Lands Clauses Consolidation (Scotland) Act, 1845, secs. 3 and 27.

[12] A.S., 11th July, 1828, sec. 117; Evidence (Scotland) Act, 1866, sec. 2.

[13] 17 & 18 Vict. cap. 34, sec. 1.

[14] 6 & 7 Vict. cap. 82 secs. 5 and 6.

(xiii.) for forfeiture of mid superiority;[1]

(xiv.) for judicial factors to persons deceased under the Bankruptcy Act;[2]

(xv.) for the award and recall of sequestration and matters incidental thereto under the Bankruptcy (Scotland) Act, 1913;[3]

(xvi.) for the registration of English or Irish judgments after the lapse of a year;[4]

(xvii.) for the appointment of an arbiter under the Small Landholders (Scotland) Act, 1911;[5]

(xviii.) under the Companies (Consolidation) Act, 1908;[6]

(xix.) for the appointment of a judicial factor under the Companies Clauses Consolidation (Scotland) Act, 1845, sec. 57.[7]

It has been held that the Lord Ordinary on the Bills may exercise in vacation the *nobile officium* of the Court in the following cases:—

(i.) Applications for custody of children;[8]

(ii.) Petitions and complaints for breach of interdict;[9]

(iii.) Rectification of error in *Gazette* notice;[10]

(iv.) Appointment of a returning officer,[11] and in other Petitions of an urgent nature.[12]

(v.) Commission to take evidence where summons signeted but not executed.[13]

In two Petitions for the exercise of the *nobile officium* of the Court the Lord Ordinary on the Bills in vacation ordered intimation and service, and in one the Inner House without delivering

[1] 31 & 32 Vict. cap. 101, sec. 104.

[2] Bankruptcy (Scotland) Act, 1913, secs. 2 and 163; A.S., 6th January, 1914. See also A.S., 25th November, 1857, sec. 29; C.A.S., G. II. schedule No. 1; Clerks of Session (Scotland) Act, 1889, sec. 3.

[3] Secs. 2, 11, 14, 30, 35, 43, 71, 74, 82, 85, 89, 90, 98 (1), 98 (2), 99, 101, 113, &c.

[4] Judgments Extension Act, 1868, sec. 2.

[5] 1 & 2 Geo. V. cap. 49, sec. 7 (11).

[6] Section 135. See also *Macfie* v *Portobello Pier Co.*, 1886, 24 S.L.R. 1; *London County and Westminster Bank, Ltd., Petitioners*, 1911, S.C. 1073; *Proprietors of the Royal Exchange Buildings, Glasgow, Petitioners*, 1911, S.C. 1337; Wilton on Companies, pp. 248-9.

[7] *Wright* v *Cart Navigation Trustees*, 1904, 11 S.L.T. 708; Wilton on Companies, pp. 648-9; *cf.*, however, *Glasgow, Garnkirk, and Coatbridge Railway Co.* v *Caledonian Railway Co.*, 1850, 12 D. 944; *Broad* v *Edinburgh Northern Tramways Co.*, 1888, 15 R. 615.

[8] *Edgar* v *Fisher's Trustees*, 1893, 21 R. 59. See also *Buchan* v *Cardross*, 1842, 4 D. 1268.

[9] *Glasgow International Exhibition* (1901) v *Sosnowski*, 1901, 39, S.L.R. 28.

[10] *Naismith, &c., Petitioners*, 1910, 47 S.L.R. 625.

[11] *Provost of Pollokshaws, &c., Petitioners*, 1882, 20 S.L.R. 19.

[12] Beveridge's Forms of Process, I. 228 *et seq.*

[13] *Harley* v *Harley*, 29th August, 1911, Lord Johnston (not reported.)

any opinions ordered intimation and service of new,[1] and in the other the intimation, advertisement, and service was held to be sufficient.[2]

Where an application is made in vacation to the Lord Ordinary on the Bills in a process depending in the Inner or Outer House, or where there is presented in vacation to the Lord Ordinary on the Bills an original application which during session would be presented in the Inner or the Outer House, the application should be addressed not to the Lord Ordinary on the Bills, but in the particular way in which it would be addressed during session.[3] The importance of this is obvious when the question of reclaiming from the judgment of the Lord Ordinary on the Bills in vacation is considered. A judgment of the Lord Ordinary on the Bills may be reclaimed against within fourteen days, but when the Lord Ordinary on the Bills in vacation merely comes in place of the Junior Lord Ordinary, or any Lord Ordinary, the number of days during which a reclaiming note may be presented is not fourteen, but the particular number of days during which it is competent to reclaim against the interlocutor if pronounced by the Junior Lord Ordinary, or any Lord Ordinary (as the case may be) during session.[4] Accordingly, it is necessary to address such an application in the manner in which it would be addressed during session. The result is that the particular clerk who would attend to the application during session should attend the Lord Ordinary on the Bills during vacation and see such an application disposed of. It is only when the application to the Lord Ordinary on the Bills in vacation is an application which in session would be presented in the Bill Chamber that the Clerk of the Bills takes charge.

At the Courts held in vacation it is competent for the Lord Ordinary on the Bills to deal with applications for commission and diligence for the recovery of writings or the taking of evidence to lie *in retentis*;[5] and he may also entertain and dispose of all incidental motions in Petitions presented to the Inner House, provided that such motions do not, in the case of contentious Petitions, involve the merits of the cause.[6]

[1] *Aberdeen University Court, Petitioners*, 1901, 4 F. 122.

[2] *Buchanan, &c., Petitioners*, 1910, S.C. 685.

[3] *Staveleys, Petitioners*, 1883, 20 S.L.R. 565. See also *Edgar* v *Fisher's Trustees*, 1893, 21 R. 59 (Session papers); *Buchanan, &c., Petitioners*, 1910, S.C. 685. See, however, *Morison* v *Rennie*, 1847, 10 D. 146.

[4] *Staig* v *Johnston*, 1875, 2 R. 701.

[5] Court of Session Act, 1868, sec. 93.

[6] C.A.S., A. I. 3 (*b*); A.S., 20th March, 1907, sec. 11.

CHAPTER XV.

WAR.

When this country is at war, our Courts are frequently called upon to decide grave and difficult questions in connection with our world-wide trade and commerce. So far as such questions are of a general character and are not peculiar to the present European conflict this work has no concern therewith, but there are one or two points of practice and procedure, which have been the subject of special legislation and decision in connection with the present war, and these may with advantage be shortly noticed.

I.—Courts Emergency Powers.

A. The Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. V. cap. 78).

B. The Courts (Emergency Powers) Order, 1914 (17*th September*, 1914).

C. The Courts (Emergency Powers) (Scotland) Order, 1914 (28*th November*, 1914).

D. Act of Sederunt (28*th September*, 1914).

Decisions.—In a case where a debtor, who was the lessee of a picture house in Lochgelly, pleaded that a large proportion of the male population was absent on military service, and that those remaining were earning small wages, and that the attendance at his picture house had fallen off to such an extent that the drawings did no more than cover expenses, the First Division suspended execution of a decree for six weeks.[1] In an action, which was undefended, the pursuers, on the same day as the case appeared

[1] *Crowe* v *Irvine*, 1914, 2 S.L.T. 378.

in the undefended roll, moved the Lord Ordinary for leave to proceed with diligence. The motion was opposed by the debtor who stated that he was unable immediately to make payment by reason of circumstances attributable to the present war and the Lord Ordinary *refused* leave to proceed with diligence and stayed execution for three months.[1] It is thought that the terms of the interlocutor should have been to allow (not to refuse) the pursuers to proceed with diligence but to stay execution, &c.

Where the application is unopposed no expenses are allowed to the applicant.[2]

II.—Trading with the Enemy.

A. Trading with the Enemy Act, 1914 (4 & 5 Geo. V. cap. 87).

B. Trading with the Enemy Amendment Act, 1914 (5 Geo. V. cap. 12).

C. Act of Sederunt, 15*th December*, 1914.

D. Proclamation No. 2, 9*th September*, 1914.

E. Proclamation, 8*th October*, 1914.

F. Proclamation, 26*th October*, 1914.

Decisions.—A German Company having its head office in Berlin and having manufacturing works in Germany had also an office in London in charge of a manager who had authority to enter into contracts and to sue and be sued on behalf of the Company. In respect of this office the Company was registered under the Companies Acts, 1908, as a foreign company having a place of business in the United Kingdom. The Court *held* that the pursuer's office in the United Kingdom was not a "branch" in the sense of section 6 of the Proclamation, No. 2, of 9th September, 1914, and that the payment of money after the date of the Proclamation in fulfilment of a previous contract was not a "transaction" in the sense of that section; and in respect that no effective decree in favour of the pursuers could be pronounced, *sisted* process.[3]

[1] *Brandon Hill, Limited* v *Frater*, 1915, 1 S.L.T. 199.

[2] *Standard Property Investment Co., Limited* v *Scott*, 1914, 2 S.L.T. 369.

[3] *Orenstein and Koppel* v *Egyptian Phosphate Co., Limited*, 1915, S.C. 55.

In counter actions between a firm of steamship owners and a storage company the Lord Ordinary, having conjoined the actions, thereafter sisted a German subject as pursuer in the action at the instance of the storage company. A proof having been taken, the Lord Ordinary decerned against the storage company in the action against them, and, in the action at their instance, assoilzied the defenders. After a reclaiming note had been presented by the storage company, war was declared between Great Britain and Germany. The respondents then moved the Court to sist procedure *quoad* the action at the instance of the storage company in respect that the true pursuer therein was an alien enemy, and *quoad* the other action to sustain the Lord Ordinary's interlocutor, but the Court sisted both actions.[1]

III.—Powers to obtain information as to Stocks of Articles of Commerce.

A. Articles of Commerce (Returns, &c.) Act, 1914 (4 & 5 Geo. V. cap. 65).

B. Minute of the Lord President.—Edinburgh, 25*th February*, 1915.—The Lord President has selected the Lord Ordinary on the Bills to act as Arbiter under and in terms of Section 2 (1) of the Articles of Commerce (Returns, &c.) Act, 1914, 4 & 5 Geo. V. cap. 65.[2]

IV.—Title to Sue.—The questions of capacity of alien enemies to sue in the King's Courts; their liability to be sued; their capacity to appeal to the Appellate Courts; and generally their right to appear and be heard in the King's Courts; were recently considered in the English Court of Appeal.[3]

[1] *Craig Steamship Co., Limited* v *North British Storage and Transit Co.*, 1915, S.C. 113.

[2] Published in the Rolls of Court of Session—Winter Session 1914-15, issued Thursday, 25th February, 1915.

[3] *Porter* v *Freudenberg; Krelinger* v *Samuel and Rosenfeld; In re* Merten's Patent, 19th January, 1915; 31 Times Law Reports, p. 163, and the cases therein referred to. *See also Schulze, Gow & Co.* v *Bank of Scotland*, 1914, 2 S.L.T. 455.

APPENDIX.

THE COMMERCIAL BANK OF SCOTLAND, LIMITED *v.* SCOTT'S EXECUTRIX.

I.—PETITION FOR SEQUESTRATION.

THE PETITION OF THE COMMERCIAL BANK OF SCOTLAND, LIMITED, incorporated by Royal Charter and by Act of Parliament, and having their principal office in George Street, Edinburgh, a creditor of the deceased Adam White Scott, formerly aerated water manufacturer, Leith, and residing at No. 1 Murrayfield Avenue, Edinburgh, to the extent required by law.

Humbly Sheweth,—

That the said Adam White Scott was at the time of his death, which happened at Edinburgh on or about the 10th day of April, 1910, subject to the jurisdiction of the Supreme Courts of Scotland.

That the petitioners were creditors of the said Adam White Scott at the time of his death to the extent of £830 11s. 11d. (Eight hundred and thirty pounds eleven shillings and elevenpence), and the said debt is still resting owing to the petitioners conform to oath and account herewith produced.

That the said Adam White Scott left a holograph will, dated 29th December, 1893, appointing his wife, Mrs. Margaret Ann Logan or Scott, residing at No. 1 Murrayfield Avenue aforesaid, to be his sole executrix and trustee, and that the children of the said Adam White Scott are the sole beneficiaries under said will. The said Mrs. Margaret Ann Logan or Scott, as executrix and trustee foresaid, entered upon the management and administration of the trust estate, and made up title to the moveable estate by confirmation in her favour on 5th September, 1910. By deed of assumption and conveyance and minute of resignation, dated 2nd and registered in the Books of Council and Session 8th December, 1910, the said Mrs. Margaret Ann Logan or Scott assumed as trustees under the said holograph will, William John Beveridge, merchant, residing at No. 7 James Place, Leith, and Henry John Beveridge, merchant, residing at No. 1 Murrayfield Avenue aforesaid, and herself resigned office.

That at the time of his death the said Adam White Scott resided in Edinburgh, and was then owner of heritable property in Scotland, all as deponed to in the oath accompanying this petition.

That in order to realise the estates of the said Adam White Scott for behoof of his creditors, the petitioners are under the necessity

of applying to your lordship for sequestration of his estates, in terms of the Bankruptcy (Scotland) Act, 1856, and Acts explaining and amending the same.

May it therefore please your lordship to grant warrant for citing the said William John Beveridge and Henry John Beveridge, as trustees foresaid, the said Mrs. Margaret Ann Logan or Scott, and the following parties, being the whole children of the said deceased Adam White Scott, viz.:—Jane Morrison Scott and Ada White Scott, residing at 1 Murrayfield Avenue aforesaid, Mrs. Ethel Margaret Scott or Beveridge, wife of and residing with the said Henry John Beveridge, and the said Henry John Beveridge for his interest, and Logan Morrison Scott, Land Titles Office, Saskatoon, Saskatchewan, Canada, to appear before your lordship, on such inducie as your lordship may direct, to show cause why sequestration of the estates of the said deceased Adam White Scott should not be awarded; also to direct intimation of the said warrant and of the diet of compearance to be made in the *Edinburgh Gazette;* and on again resuming consideration of this petition to award sequestration of the estates of the said deceased Adam White Scott belonging to him at the time of his death, and to declare the said estates to belong to his creditors for the purposes of the said statutes; Further, to appoint a meeting of the said creditors to be held within Dowell's Rooms, George Street, Edinburgh, on the day of , at o'clock noon, to elect a trustee or trustees in succession and commissioners on the sequestrated estates of the said deceased Adam White Scott, and to do the other acts provided by the said statutes; and thereafter to remit to the Sheriff of the sheriffdom of the Lothians and Peebles at Edinburgh to proceed in the manner mentioned in said statutes; Further, to ordain the said William John Beveridge and Henry John Beveridge, as trustees foresaid, and the said Mrs. Margaret Logan or Scott, as executrix foresaid, or any successor who has made up a title to or is in possession of the estate, to convey the same or any part of the said deceased's estate, which is in their or such successor's possession, to the trustee to be appointed by his creditors; or to do otherwise in the premises as to your lordship shall seem just.

According to Justice, &c.,

JOHN L. MOUNSEY, W.S.,
Agent for Petitioners.

II.—OATH BY PETITIONERS.

At Edinburgh, the 16th day of December, Nineteen hundred and ten years, in presence of John Nicholson, Esquire, one of His Majesty's Justices of the Peace for the county of the city of Edinburgh, compeared James Lawson Anderson, secretary of the Commercial Bank of Scotland, Limited, incorporated by Act of Parliament, and having its chief office in George Street, Edinburgh, who, being solemnly sworn and interrogated, depones: That Adam White Scott, formerly aerated water manufacturer, Leith, and residing at No. 1 Murrayfield Avenue, Edinburgh, was at the date of his death, and his estate still is justly indebted and resting owing to the Commercial Bank of Scotland, Limited, the sum of £830 11s. 11d. (eight hundred and thirty pounds eleven shillings and elevenpence), being the amount of overdraft on his deposit account with the said bank, together with interest, conform to the certified statement hereto annexed, and subscribed as relative hereto: depones that no part of said sum has been paid or compensated, that there are no other obligants for the debt, that the said Commercial Bank of Scotland, Limited, holds 100 shares in the London and Edinburgh Shipping Company in its own name, and 25 shares of the bank in name of the said deceased Adam White Scott, in security for the said debt, and that no further security is held against said debt: that the said deceased Adam White Scott at the time of his death (on 10th April, 1910) resided at 1 Murrayfield Avenue aforesaid, and that at the time of his death he was owner of heritable property in Scotland. All which is true, as the deponent shall answer to God.

J. L. Anderson.
John Nicholson, J.P.

III.—LETTER OF AGREEMENT BY ADAM WHITE SCOTT.

It is hereby agreed that all stocks, shares, and securities of any description which have already been, or may at any time or times hereafter be, lodged with you or transferred into the names of your nominees by or on account of me, as well as all interest and dividends accrued and to accrue thereon, are and shall be held by you in security and for payment to you of all sums of money which now are or may from time to time hereafter be due by me to you, or for which I now am or may at any time hereafter be responsible to you in any manner of way, and of all interest due and to become due thereon at the rate you may from time to time fix. And, for the purpose of effectuating repayment of such advances, you shall have full power to sell the said stocks and shares and securities, or any of them, at pleasure, and to grant all transfers or assignations neces-

sary for carrying said sales into effect, I being liable for any deficiency that may arise between the net proceeds of the securities and the amount due to you, including interest and expenses of realisation. Further, it is understood and agreed that the current market price of the securities held by you shall at all times represent a value exceeding by per cent. the amount of the advances then outstanding; and if at any time it be otherwise, I engage, on due notice from you, to provide you with such additional security to your satisfaction, or to pay off so much of the advances as shall restore the said margin. Declaring that a certificate under the hand of your manager or secretary for the time shall be sufficient without any other voucher to constitute and ascertain the amount of all sums and interest for which I may at any time be liable to you.

Signed by Adam White Scott, one Murrayfield Avenue, Edinburgh, at Edinburgh, the twenty-ninth day of December, Nineteen hundred and eight, in the presence of us:—

	6d.	
A.	W. SCOT	T.
	Stamp.	

J. L. Anderson, solicitor, 14 George Street, Edinburgh, Witness.

J. W. Alston, of 14 George Street, Edinburgh, bank clerk, Witness.

29th December, 1908. We acknowledge that a transfer has been granted in our favour to-day of 100 shares London and Edinburgh Shipping Company, Limited, to be held in terms of the foregoing letter.

For The Commercial Bank of Scotland, Limited,

J. L. Anderson, Secy.

IV.—INTERLOCUTOR AND OPINION OF THE LORD ORDINARY ON THE BILLS.

20th January, 1911.—Lord Ormidale.—*Act.* Strain—*Alt.* Wark.—The Lord Ordinary having considered the petition and whole proceedings, and heard counsel for parties, dismisses the petition and decerns; Authorises a marking of the dismissal to be made on the margin of the Register of Inhibitions, and in the Register of Seques-

trations, and that upon production of a certified copy of this interlocutor; Finds the petitioners liable to the respondents in expenses, and remits the account thereof when lodged to the Auditor to tax and to report. GEORGE L. MACFARLANE.

Note.—This is a petition for the sequestration of the estate of the deceased Adam White Scott at the instance of the Commercial Bank of Scotland, Limited, who design themselves as creditors of the deceased to the extent of £830 11s. 11d.

Mrs. Scott, the widow and sole executrix of the deceased, and one of the parties on whom the petition was served, appears to oppose the award. She does so on the ground that the debt in question—it appears to be the only debt due by the deceased to the petitioning creditor—has been paid, or, at least, satisfied. And she refers to No. 12 of process, being an agreement between the deceased and the petitioning creditor, dated 29th December, 1908.

The debtor, if he had been alive, would, by the express terms of section 30 of the Bankruptcy Act, 1856, have been entitled to prevent sequestration being awarded, by producing written evidence of the payment or satisfaction of the debt due to the petitioning creditor. I think it is implied that in the case of a deceased debtor, his successor is also entitled to do so.

Now, the agreement upon which the respondent founds, sets out the transference to the bank of certain shares of the London and Edinburgh Shipping Company, Limited, not only in security but "for payment" of any debt due to them by the deceased. The present value of these shares is certified by No. 14 of process to be in excess of the petitioners' debt, and this was not disputed.

As these shares are, in fact, standing in the bank's name on the register of the company, and the bank have the undoubted right and title to treat them as their own to the extent of their debt, or to sell them, and with the proceeds extinguish their debt, it appears to me that their debt, if not paid, is at any rate satisfied. The bank is certainly in as good a position as if consignation of the amount of their debt had been made. I was referred to the following cases, all of which in principle support the respondent's contention:—*Roger*, 1850, 12 D. 985; *Speid* v. *Stirton*, 1850, 12 D. 985; and I think there is nothing contradictory of it in *M'Letchie*, 1899, 1 F. 946. G. L. M.

V.—OPINIONS OF JUDGES OF FIRST DIVISION.

LORD PRESIDENT DUNEDIN—I think the Lord Ordinary has entirely misunderstood the position of matters. The petition is a petition by the creditors of the deceased Adam White Scott, along with which they produced an oath to a debt in ordinary form, and petitioners

ask for sequestration of the deceased debtor's estates. It has been held under the statute of 1856 that sequestration must be awarded *ex debito justitiæ* if the proper requisites under the statute are complied with, and therefore to cite, as the Lord Ordinary does, two cases decided under the previous Act 1 and 2 Vict. on the proper interpretation of which statute the Court held they had a discretion, seems to me to be citing two cases which cannot have the least bearing on the question. The position therefore being, as decided in the well-known case of *Joel*, that the Court had no discretion in awarding sequestration, the only question is, has there been payment or satisfaction of the debt? There has certainly not been payment, and as little has there been satisfaction. We are shown a letter of agreement, No. 12 of process, which appears to be one of the commonest forms of document under which a bank takes securities from individuals to whom overdrafts have been granted. Under this document it is agreed that all stocks, &c., which may be lodged or transferred with the bank are to be held in security and for payment of the bank's debt, and the bank is given very large powers for selling these securities at any time. It is also provided that the security shall be kept up so as to be within a certain margin. All these provisions do not alter the fact that the securities are held by the bank in security, and that payment or satisfaction can only be got when these securities are actually realised and applied in payment of the debt. A complete test of the matter is that if the debt is paid or satisfied, then the debtor is entitled to a discharge. To suppose that any one could demand a discharge merely upon an agreement of this kind is really to suppose something quite impossible. I therefore think the interlocutor of the Lord Ordinary is undoubtedly wrong, and ought to be recalled.

Lord Kinnear—I am very clearly of the same opinion. I think, in the first place, that to hold security for a loan is not the same thing as obtaining payment or satisfaction. It may be that the security is in the creditors' own hands and realisable, but the mere fact that he holds it as a security, as is undoubtedly the position in the present case, only goes to show that there is an unpaid debt of which he may or may not be able to recover the amount. If security is not in itself satisfaction (as I hold), I am very clearly of opinion that it is settled by persistent practice based on decision under the 1856 Act, that the Court has no discretion in awarding sequestration. It is a purely Ministerial Act which the Court is bound to perform when the statutory requisites are satisfied. The cases which have been decided under the previous statute have obviously no application.

Lord Mackenzie—I entirely concur.

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